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IN THE

Supreme Court of the United States

LUCY VIRGILIO, Personal Representative of Lawrence Virgilio, GERALDINE HALDERMAN, Personal Representative of Lt. David Halderman, EILEEN TALLON, Personal Representative of Sean Patrick Tallon, GERGARD J. PRIOR, Personal Representative of Kevin M. Prior, CATHERINE REGENHARD, Personal Representative of Christian Regenhard, MAUREEN L. DEWAN-GILLIGAN, Personal Representative of Gerard P. Dewan, JAMES BOYLE, Personal Representative of Michael Boyle, EDWARD SWEENEY, Personal Representative of Brian Sweeney,

(*caption continued on inside front cover*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioners,

—against—

CITY OF NEW YORK and MOTOROLA, INC.,

Respondents.

QUESTIONS PRESENTED FOR REVIEW

Congress created an exclusive federal cause of action for all claims "arising out of" the terrorist hijackings and air crashes of September 11, 2001, and vested exclusive jurisdiction in the United States District Court for the Southern District of New York over all cases "resulting from or relating to" such events to encourage consistency in judgments. In the same statute, Congress created a compensation fund for victims pursuant to which claimants on the fund waive the right to bring a civil action for "damages sustained as a result of" the hijackings and air crashes. The questions presented are:

1. Whether the United States Court of Appeals for the Second Circuit has a duty or responsibility to resolve fundamental conflicts among panels of that court with respect to the construction of the statute on questions having an outcome determinative effect on the right of families of victims of that tragedy to seek and to obtain judicial relief against independent tortfeasors.

2. Whether the plain meaning of the waiver provision ("as a result of") is narrower than the jurisdictional grant ("resulting from or related to") so that claimants on the fund do not waive claims against independent tortfeasors whose acts were a separate and additional proximate cause of deaths "relating to" but not "resulting from" the terrorist acts.

3. Whether the court of appeals holding that the statutory provision by which claimants on the compensation fund waive the right to sue for "damages sustained" as a result of the terrorist acts is the "functional equivalent" of a release of "all debts, claims, demands, damages, actions, and causes of action" is contrary to and conflicts with decisions of the Court and the courts of appeals holding that the term "damages sustained" is limited to compensatory damages.

4. Whether the court of appeals should have certified an unresolved and possibly controlling question of state law to the New York Court of Appeals, especially where the federal statute created an exclusive federal cause of action with exclusive federal jurisdiction, but mandates that the substantive law of New York applies.

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Petition for Writ of Certiorari

Lucy Virgilio, the personal representative of Lawrence Virgilio, and the twelve other appellants below,[1] petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The July 15, 2005 Order of the court of appeals denying petitioners' petition for rehearing and rehearing *en banc* (1a) is unreported. The April 29, 2005 opinion of the court of appeals (2a) affirming the order and judgment of the United States District Court for the Southern District of New York is reported at 407 F.3d 105. The April 12, 2004 Final Judgment of the district court (24a) is unreported; the unreported March 10, 2004 Order of the district court (26a), upon which the final judgment is based, is available on Westlaw at 2004 WL 433789. The January 29, 2004 Memorandum and Order of the district court (31a) is reported at 307 F. Supp. 2d 504.

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[1] Geraldine Halderman, Personal Representative of Lt. David Halderman, Eileen Tallon, Personal Representative of Sean Patrick Tallon, Gergard J. Prior, Personal Representative of Kevin M. Prior, Catherine Regenhard, Personal Representative of Christian Regenhard, Maureen L. Dewan-Gilligan, Personal Representative of Gerard P. Dewan, James Boyle, Personal Representative of Michael Boyle, Edward Sweeney, Personal Representative of Brian Sweeney, Gerald Jean-Baptiste, Co-Personal Representative of Gerard Jean Baptiste, Jr., Alexander Santora, Personal Representative of Christopher Santora, Maureen Santora, Personal Representative of Christopher Santora, Raffaela Crisci, Personal Representative of John A. Crisci and Patricia DeAngelis, Personal Representative of Thomas P. DeAngelis. All parties in the court of appeals are listed in the caption of this Petition.

Jurisdiction

The court of appeals rendered judgment on April 29, 2005. Petitioners' timely petition for rehearing and rehearing *en banc* was denied on July 15, 2005. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutes Involved

The Air Transportation Safety and System Stabilization Act ("ATSSSA"), 49 U.S.C. § 40101 note, Pub. L. No. 107-42, 115 Stat. 230 (2001), is reprinted in the Appendix (61a-85a).

Statement

Introduction

On September 11, 2001, the world changed. For the persons represented by petitioners in this action—including widows, children and parents of firefighters killed in the collapse of the World Trade Center towers—that change was catastrophic. What was not known publicly at the time, but is now confirmed by *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004) ("Commission Report") and by recently released audiotapes of New York City, is that those deaths could have been prevented but for the misfeasance and culpable negligence of agents and officials of the defendants Motorola Inc. ("Motorola") and the City of New York.

Both Motorola and City officials knew that the antiquated analog radio equipment used by the firefighters would not work in high-rise buildings, and indeed that it had failed at the time of the February 26, 1993 terrorist bombing of the World Trade Center. As the *Commission*

Report emphasizes, that faulty equipment predictably failed again on September 11. As a result, firefighters were unable to communicate with fire chiefs directing their activities and thus did not receive numerous evacuation orders, proximately resulting in their deaths.

This lawsuit seeks to hold defendants responsible for that culpable conduct.

Proceedings Below

Petitioners, the personal representatives of firefighters who died in the World Trade Center collapse, commenced this action for wrongful death against the City of New York on December 22, 2003. Petitioners filed an amended complaint on January 20, 2004, adding Motorola as a party defendant. The amended complaint alleged, *inter alia*, that Motorola intentionally and recklessly misled the City into purchasing new equipment and using old equipment that Motorola knew or should have known would fail in high-rise buildings; that City officials and Motorola colluded and acted in concert to ensure that Motorola would be awarded the contracts to provide that equipment; that the City and Motorola culpably failed to ensure that the equipment would work properly; and that both defendants knowingly and recklessly permitted the use of the old equipment that already had failed in the first World Trade Center bombing. Petitioners further alleged that these culpable, intentional and grossly negligent acts independently caused or contributed to the deaths of plaintiffs' decedents, New York City firemen.

The lawsuit was brought in the United States District Court for the Southern District of New York pursuant to the Air Transportation Safety and System Stabilization Act ("ATSSSA"), 49 U.S.C. § 40101 note, Pub. L. No. 107-42, 115 Stat. 230 (2001). ATSSSA created an

"exclusive" "Federal cause of action for damages arising out of the hijacking[s] and subsequent crashes . . . on September 11, 2001," § 408(b)(1), and vested in the Southern District

> original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) *resulting from or relating* to the terrorist-related aircraft crashes of September 11, 2001.

Id., § 408(b)(3) (emphasis added).

In addition, ATSSSA created a Victim Compensation Fund ("VCF"), *id.*, § 401, to provide compensation for victims "injured or killed as a result of" the airplane crashes of September 11. *Id.*, § 403. The statute mandated that victims who applied for compensation under the fund "waive[ ] the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained *as a result of* the terrorist-related aircraft crashes of September 11, 2001." *Id.*, § 405(c)(3)(B)(i)) (emphasis added).

Petitioners claimed that the statutory waiver provision, construed in the context of the language and structure of the entire statute, and consistent with its stated purpose to save the air transportation industry from economic collapse,[2] applies only to claims for acts or omissions that were incident to the "terrorist-related aircraft crashes," *i.e.*, acts that culpably caused or allowed the hijackings or the crashes to occur. It does not bar actions seeking compensation for damages proximately caused by independent tortious conduct of entities, such as Motorola, whose acts did not cause or allow the hijack-

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[2] The Act's purpose is stated in its preamble: "An Act to preserve the continued viability of the United States air transportation system" (61a).

ings or crashes and whose financial solvency bears no relationship to the air transportation sector's preservation.

On January 21, 2004, petitioners moved to stay earlier orders of District Judge Alvin K. Hellerstein requiring that cases brought by victims who had VCF awards pending as of January 22, 2004 be dismissed within ten days of that date. On January 22, 2004, in an oral ruling from the Bench, Senior District Judge Charles S. Haight, Jr., sitting as the emergency judge, denied the motion in major respects, for reasons set forth in his subsequent written Memorandum and Order of January 29, 2004 (31a). Judge Haight held that the waiver provision of ATSSSA, § 405(c)(3)(B)(i), requires a complete waiver against any potential defendant (with two narrow exceptions for "collateral source obligations" and the terrorists themselves) and for all claims (51a-52a).

The defendants then moved to dismiss the petitioners' claims pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, on the ground that by filing claims with the VCF, each petitioner had waived his or her right to proceed with a judicial remedy. District Judge Hellerstein, to whom the case was permanently assigned, granted the motions and dismissed the actions, explicitly relying on the January 29, 2004 opinion of Judge Haight (28a-29a).

On appeal, petitioners argued that the waiver provision, which encompassed only claims that were "a result of the terrorist-related aircraft crashes," § 405(c)(3)(B)(i), was significantly narrower in scope than the provision creating exclusive jurisdiction in the Southern District of New York for all claims "resulting from or relating to" those crashes. § 408(b)(3). Noting that a panel of the Second Circuit had already held that even the jurisdictional provision did not reach all claims for injuries that would not have occurred "but for" the

aircraft crashes, *Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52 (2nd Cir. 2003), petitioners argued that the waiver provision reached only claims incident to the crashes, and not claims against independent tortfeasors whose acts were a separate proximate cause of the injuries.

Petitioners also argued on appeal that the waiver provision was limited to "damages sustained" as a result of the terrorist related airplane crashes, a term that the Court and lower federal courts consistently have construed as encompassing only compensatory damages. Accordingly, petitioners requested a remand so that they could pursue claims for punitive damages.

The court of appeals affirmed, holding that the waiver provision is unambiguous and that it mandates waiver of all claims that would not have arisen, in effect, but for the events of September 11, even if there was also an independent proximate cause: "[T]he injuries to plaintiffs and their loved ones resulted from a series of interrelated acts that began with the terrorist attack. Even assuming independent, successive tortious acts by both the terrorists and defendants . . . we are hard pressed to find plaintiffs' damages did not result—*at least in part*—from the terrorist attacks." (15a) (emphasis added). The court focused exclusively on the language of § 405(c)(3)(B)(i). It ignored the broader language used in the jurisdictional grant of § 408(b)(3), and failed to explain why the differences in that language did not create at least ambiguity as to the scope and breadth of the waiver provision. Moreover, it did not even attempt to reconcile its interpretation of the statute with the conflicting interpretation by the Second Circuit panel in *Canada Life Assurance* that even the jurisdictional grant in ATSSSA did not extend to all "but for" claims.

The court of appeals also considered petitioners' "damages sustained" argument on the merits despite finding that petitioners did not raise it below (19a), but rejected petitioners' argument that § 405(c)(3)(B)(i), by its use of the words "claimant waives the right to file a civil action . . . *for damages sustained*," limited the waiver to claims for compensatory damages. Despite the fact that "[c]ases universally distinguish a recovery for 'damages sustained' from a punitive damage award," *Baas v. Hoye*, 766 F.2d 1190, 1195 (8th Cir. 1985), the court of appeals held that petitioners' waivers of claims for "damages sustained" were the "functional equivalent" of releases of "all debts, claims, demands, damages, actions, and causes of action" (21a) (citing *Rocanova v. Equitable Life Assurance Society*, 83 N.Y.2d 603, 616 (1994)).

Petitioners timely sought rehearing and rehearing *en banc*, arguing that the court of appeals panel had ignored the conflicting decision of a different panel in the *Canada Life* case and had fundamentally misinterpreted the waiver provision as encompassing all claims for relief, as opposed to merely claims for compensatory damages.

While the petition was pending, yet another Second Circuit panel of entirely different judges considered a case involving cross-appeals from a decision of Judge Hellerstein on the scope of the jurisdictional section of ATSSSA, § 408(b)(3). On July 14, 2005, that panel issued an opinion that was fundamentally at odds with the opinion of the panel in this case. *In re WTC Disaster Site*, 414 F.3d 352 (2nd Cir. 2005). In contrast to the court below's holding that the scope and reach of § 405(c)(3)(B)(i) of ATSSSA was clear and unambiguous on its face and encompassed, in effect, all "but for" claims, the panel in *In re WTC Disaster Site* held that

> the respective reaches of terms such as "arising out of," "resulting from," and "relating to" are not self-evident. When § 408 is compared to § 405 . . . it is evident that § 408 is broader in two significant respects. First . . . § 405 sets exacting criteria with respect to the times and place of injury.
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> * * *
>
> Second, whereas § 405 relief [and waiver] is limited to injuries suffered "as a result of" the air crashes, the scope of § 408, dealing with "*all* actions brought for *any* claim . . . resulting from or relating to" the crashes (emphasis added [by the court]) is clearly broader.

414 F.3d at 375-376.

Thus, the holding of the court below that § 405(c)(3)(B)(i) in effect sweeps in all "but for" claims cannot be reconciled with the *In re WTC Site* panel's recognition that § 405's reach is clearly narrower than § 408(b)(3), and the *Canada Life* panel's holding that even the latter section does not include all "but for" claims. Despite these manifest conflicts, on July 15, 2005, the very day after the *In re WTC Site* decision was announced, the court of appeals denied petitioners requests for rehearing and rehearing *en banc*.

Facts

The 9/11 Commission Report repeatedly refers to the inability of New York City firefighters operating in the World Trader Center towers after the terrorist airline crashes to communicate with fire chiefs directing their activities due to faulty communications equipment.[3] The

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[3] *Commission Report* at 299 ("limited effectiveness of FDNY radios in high-rises"); *id.* at 307 ("firefighters did not receive the evacuation transmissions [in part because] some FDNY radios did not

Report's observations recently were confirmed by the City's release of audio tapes of communications, or lack of same, between and among first responders to the tragedy, especially firefighters. As a result, most firefighters in or about the North Tower did not receive multiple evacuation orders and died when the towers collapsed.

As alleged in the Amended Complaint,[4] Handi-talkie Saber I analog radios purchased by New York City from Motorola were used by New York firefighters at the time of the terrorist bombing of the World Trade Center on February 26, 1993. At that time, defendants discovered that firefighters on the upper floors of a high-rise building could not communicate with each other or their command posts using this radio system. Although defendants had notice of the serious defect from first-hand accounts and a professional investigator's report, technologically feasible improvements were not made.

In 1997, New York City contracted with Motorola to supply limited replacement equipment consisting of up to 750 Saber radios and parts, to "maintain" the Saber I radios then in use. In 1999, after notifying the City of its intention to discontinue Saber radios, Motorola fraudulently represented that its "new" XTS 3500 radios (which, in fact, had not been developed, much less field

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pick up the transmission because of the difficulties of radio communications in high-rises"); *id.* at 319-20 ("internal communications breakdowns resulting from the limited capabilities of radios in the high-rise environment of the WTC"); *id.* at 322 ("the radios' effectiveness was drastically reduced in the high-rise environment"). These references are in chapter 9 of the *Commission Report*, entitled "Heroism and Horror."

[4] Since the judgment below is based on the granting of defense motions to dismiss, all of petitioners' allegations are deemed to be true for purposes of the petition.

tested) would be the best substitute for the Saber radios previously purchased by the Fire Department of New York. Motorola and City officials conspired to avoid competitive bidding on the purchase of these radios by merely modifying the 1997 contract after custom-tailoring the specifications so that only a Motorola product could satisfy them. As a result, New York City in 1999 bought 3,818 untested XTS 3500 radios and withdrew the Saber analogs from use. But for such fraud and conspiracy, radio systems that were fully functional in high rise buildings would have been purchased, perhaps from a different manufacturer.

In March 2001 New York City ceased use of the Saber I analog radios and deployed the digital XTS 3500's. Within ten days an XTS 3500 failed to transmit the mayday call of a New York City fireman trapped in a burning home who, as a result, barely escaped death. Following this and other reported failures, the City immediately recalled all the XTS 3500's. They were replaced by the old Saber I analogs which defendants knew, after the 1993 World Trade Center bombings, would not function in high-rise buildings. Those radios, without any technological enhancements, were still exclusively used by firefighters o[illegible] September 11, 2001.

At 9:32 a.m. that day, an evacuation order to firefighters in the North Tower was sent on the Motorola Saber I system but not received by the great majority of firefighters in the building. At 10 a.m. another order for immediate evacuation was sent by radio and again not received by most of the firefighters. As a result, many firefighters, including those whose personal representatives are petitioners, did not evacuate and died in the tower. In contrast, the police officers and emergency service workers in the North Tower did receive warnings over different radio systems, and successfully escaped before the tower collapsed.

Reasons for Granting the Writ

There exist two compelling grounds upon which the Court should issue a writ of certiorari. First, in resting exclusive federal jurisdiction in the Southern District of New York for all claims "resulting from or related to the terroristic attacks and airplane crashes," Congress sought to provide a single forum for all litigation related to those events and to insure uniformity of treatment and result. It is incumbent upon the Southern District and the Court of Appeals for the Second Circuit to carry out that mandate. Instead, in a series of panel decisions, the court of appeals has created a morass of contradiction and confusion, and refused to invoke its *en banc* jurisdiction to resolve it.

The Court should grant certiorari pursuant to its supervisory powers to carry out Congress' intention of equal treatment and uniformity of decision for victims of the September 11 tragedy. The decision of the panel below fundamentally conflicts with the decisions of two other panels and effectively denies petitioners the right to seek judicial relief against parties who were significant independent tortfeasors, causing the death of petitioners' decedents. Both the public importance of a fair resolution of claims for September 11 victims and the unique circumstance where a single circuit court has exclusive jurisdiction over all related cases and fails to resolve intracircuit conflicts justifies exercise of the certiorari prerogative. The Court, of course, need not resolve the conflict itself, but rather may exercise the option of vacating the judgment and remanding for *en banc* consideration.

Second, the court of appeals construed the language of the waiver provision as the "functional equivalent" of a release of all claims, demands, damages, actions and

causes of action related to the facts at issue. But the waiver provision, by its terms, extends only to "claims for damages sustained," a term that the Court and courts of appeals have interpreted as meaning only compensatory, and not punitive, damages. Certiorari should be granted to conform the court of appeals judgment to the decisions of the Court and other circuits.

1. Certiorari Should Be Granted to Resolve the Conflicts Within the Second Circuit, the Circuit with Exclusive Jurisdiction Over Cases Related to the September 11 Tragedy, and to Carry Out Congress' Intent to Insure Uniformity of Treatment and Decisions in Such Cases.

In enacting ATSSSA, Congress chose to federalize all claims "arising from" the terrorist hijackings and plane crashes of September 11, § 408(a)(1), and to confer exclusive jurisdiction over all such claims in the Southern District of New York. § 408(a)(3). While the legislative history of the statute is sparse, and there are no committee or conference reports, both the structure of the statute and the few comments in the Congressional Record make clear that Congress intended all lawsuits be adjudicated in a single forum to insure consistency and uniformity in application. For example, Senator Schumer stated:

> It may be a little unclear to some whether *all lawsuits* or just lawsuits against the airlines will be situated in the Southern District of New York. *The intent here is to put all civil suits arising from the tragic events of September 11 in the Southern District.*

147 Cong. Rec. S9592 (Sept. 21, 2001) (emphasis added). Similarly, Senator McCain explained that "the bill

attempts to provide *some sense to the litigation* by consolidating all civil litigation arising from the terrorist attacks of September 11 in one court." 147 Cong. Rec. S9594 (Sept. 21, 2001) (emphasis added). And Senator Hatch emphasized: "For those who seek to pursue the litigation route, I am pleased that we consolidated the causes of action in one Federal court so that there will be *some consistency in the judgments* awarded." 147 Cong. Rec. S9595 (Sept. 21, 2001) (emphasis added).

The Court of Appeals for the Second Circuit has frustrated that congressional purpose by failing to reconcile conflicting panel constructions of critical portions of ATSSSA through its *en banc* powers. Indeed, the Second Circuit has long been on record as fundamentally opposed to invocation of *en banc* proceedings. *See, e.g., Green v. Santa Fe Industries, Inc.*, 533 F.2d 1309, 1310 (2nd Cir. 1976).

Whatever may be the merits or demerits of *en banc* proceedings in most cases, the procedural context of this case is extraordinary and called out for their use. The Second Circuit was placed in a unique position by ATSSSA as the only circuit that would hear appeals arising out of the September 11 tragedy. Congress gave it the responsibility to insure that all litigants before it receive equal application of the law. The Second Circuit's refusal to reconcile its conflicting holdings cries out for invocation of this Court's supervisory jurisdiction. S.Ct. Rule 10(a).

We recognize that the Court rarely invokes its certiorari power to resolve intra-circuit conflicts. Yet such use of the power is hardly without precedent, and is particularly appropriate in the special circumstances of this case. In *United States v. Johnston*, 316 U.S. 649 (1942), the Court granted certiorari and summarily vacated a Ninth Circuit judgment and remanded, because a sub-

sequent Ninth Circuit decision had created an intra-circuit conflict. That, of course, is precisely the situation here, where the Second Circuit's decision in *In re WTC Disaster Site* was issued months after the court's decision in this case, and just one day prior to issuance of the Order in this case denying *en banc* review, *i.e.*, before the entire court could even consider the clear conflict thereby created. Given the unique circumstances of the Second Circuit's exclusive jurisdiction, this case presents a much stronger basis to grant certiorari than did *Johnston*. *See Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948) (Court granted certiorari pursuant to its supervisory jurisdiction in light of differing views within the Second Circuit, which was the circuit most frequently confronted with difficult bankruptcy problems); *Kent v. United States*, 383 U.S. 541, 557 n.27 (1966) (certiorari granted where District of Columbia Court of Appeals' decisions had been "self-contradictory"). *See also Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (certiorari granted "because of this intracircuit conflict"); *John Hancock Mutual Life Ins. Co., Inc. v. Bartels*, 308 U.S. 180, 181 (1939) (same).

Certiorari is particularly appropriate because the court of appeals in this case fundamentally misconstrued a federal statute of historic import by applying an incorrect rule of construction. Both the district court and the court of appeals focused singularly on the words of the waiver provision, § 405(c)(3)(B)(i), to the exclusion of other language in the statute, in finding the provision "unambiguous" and foreclosing petitioners' lawsuit. But the plain meaning doctrine does not direct courts to focus their attention exclusively on the words used in the particular phrase, clause, or sentence whose meaning is at issue. Rather a court must look to "the plain meaning of the whole statute, not of isolated sentences," *Beecham v. United States*, 511 U.S. 368, 372 (1994), "by reference

to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

While the court of appeals dutifully acknowledged its obligation to follow these principles (12a), it failed to do so, ignoring completely the ambiguity of the meaning of the phrase "as a result of" created by the "resulting from or relating to" language in § 408(b)(3) as interpreted in *Canada Life* and *In re WTC Site*.

In *Canada Life*, the Court of Appeals acknowledged the "broad" literal terms of the language "resulting from or relating to" in § 408(b)(3), 335 F.3d at 57, but nevertheless found that the provision's meaning was ambiguous in the context of other language of the Act and the Act's purpose and effect. *Id.* at 58. Without definitively delineating the precise contours of § 408(b)(3)'s reach, the court held that, at the least, it did not encompass *all* claims "that would not have been suffered 'but for' the events of September 11 but otherwise involve no claim or defense raising an issue of law or fact involving those events." *Id.* at 59.

In *Re WTC Site*, the court of appeals emphasized the clearly narrower scope of § 405 as compared to § 408's jurisdictional grant:

> Accordingly, we conclude that whereas § 405 relief [and waiver] is limited to injuries suffered "as a result of" the air crashes, the scope of § 408, dealing with "all actions brought for *any* claim . . . resulting from *or relating* to" the crashes (emphasis added [by court] is clearly broader.

In Re WTC Site, 414 F.3d at 376.

The reasoning of the Second Circuit panels in *Canada Life* and *WTC Site* is irresistible. The language of § 405(c)(3)(B)(i) is ambiguous in the overall context of the statute's text, sweeps significantly less broadly than § 408(b)(3), and requires a significantly narrower construction of the waiver provision than that provided by the court in this case. The construction most consistent with the statutory context and purpose is that the waiver reaches only damages alleged to have resulted exclusively from acts and omissions incident to the "terrorist-related aircraft crashes" themselves, encompassing fewer than all claims of which the terrorist attacks were a cause in fact. This reading gives the phrase "as a result of" in § 405(c)(3)(B)(i) a meaning sufficiently narrow to allow for the broader scope of the "resulting from or relating to" language in § 408(b)(3), *In re WTC Site*, while also allowing for the narrowing of § 408 undertaken in *Canada Life* and giving effect to ATSSSA's primary purpose of protecting the threatened air transportation sector. Acts and omissions such as failing to institute better measures to prevent hijackings would fall within the waiver. But acts and omissions not incident to the aircraft crashes themselves remain a basis for the legal remedies normally available to injured parties.

While ignoring § 408(b)(3), the court of appeals stated that § 405(c)(2), which limits VCF eligibility to those who were present at the site and suffered harm or death "as a result" of the aircraft crashes, defeats petitioners' argument (15a). The court suggested that if petitioners were correct that the term "as a result of" in the waiver provision does not encompass their claims against Motorola, then they would not have been eligible to file claims with the VCF.

There is no such inconsistency or defect in petitioners' argument. Petitioners do not argue that their *only* potential claim was against Motorola and the City, or that they did not waive claims against some other entities. Petitioners' decedents indeed were killed "as a result of" the aircraft crashes, and petitioners were entitled to file VCF claims. Petitioners thereby waived their rights to sue for acts or omissions incident to the hijackings or crashes, *e.g.*, against an air carrier on the theory that it owed a duty to prevent the use of its jetliner as the instrument of the terrorist acts. But neither petitioners' claims with the VCF nor their waivers under § 405(c)(3)(B)(i) encompassed their claims against Motorola for acts "relating to" the crashes that independently culpably caused the deaths. The fact that petitioners waived a right to sue one set of defendants does not protect Motorola from liability.[5]

Had Congress intended to prevent VCF claimants from seeking remedies against any tortfeasor who contributed to their injuries, § 405(c)(3)(B)(i) would have waived civil actions for damages "resulting from or relating to" or "arising from the terrorist-related aircraft crashes." That Congress chose not to speak in such broad terms, despite using exactly such sweeping language in § 408, necessarily must be accorded significance.

Certiorari should be granted to create uniformity of decisions with respect to the application of ATSSSA.

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[5] Plaintiffs do not seek a double recovery. Any compensatory damages awarded by a jury must include a set off for compensation awarded by the VCF, and apportionment as to comparative fault.

2. Certiorari Should Be Granted to Conform the Decision of the Court of Appeals to the Decisions of the Court, Other Circuits, and Other Panels of the Second Circuit Holding That A Claim for "Damages Sustained" is Limited to Compensatory Damages, and Excludes Punitive Damages.

A. The Statute Confines Waiver to "Damages Sustained," Which Has Uniformly Been Construed to Mean Compensatory Damages

Even if the waiver provision is deemed to encompass petitioners' claims against the respondents, at the most they waived the right to litigate with respect to "damages sustained." ATSSSA, § 405(c)(3)(B)(i). Congress adopted this language against the unanimous backdrop of numerous federal and state court decisions holding that the term "damages sustained" refers only to compensatory damages and excludes punitive damages:

> Cases universally distinguish a recovery for "damages sustained" from a punitive damages award. [Citations omitted.] While a recovery for damages sustained is meant to compensate for the harm suffered by the plaintiff, punitive damages are assessed for the "purpose of visiting a punishment upon the defendant and not as a measure of any loss or detriment of the plaintiff." C. McCormick, *Handbook on the Law of Damages* § 77 (1935).

Baas v. Hoye, 766 F.2d 1190, 1195-96 (8th Cir. 1985).

In *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, the Court determined that the nearly identical phrase in the Labor Management Relations Act of 1947, "damages by him sustained," "reflected" "the congres-

sional judgment . . . that recovery for an employer's business losses caused by a union's peaceful secondary activities . . . should be limited to actual, compensatory damages." 377 U.S. 252, 260 & n.15 (1964) (reversing award of punitive damages).

The courts of appeals, too, including the Second Circuit in earlier opinions, have so understood this terminology. In *Re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1281 (2d Cir. 1991), *disapproved on other grounds, Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 229 (1996), the court interpreted the Warsaw Convention's language authorizing recovery for "dommage survenu" to mean "damage sustained." From that interpretation, the court "deduce[d] . . . that Article 17 [of the Warsaw Convention] contemplates monetary or compensatory damages only." *Id.*; *see also In re Korean Air Lines Disaster*, 932 F.2d 1475, 1485 (D.C. Cir. 1991) (" 'damages sustained' strongly implies that the carrier's responsibility is compensatory"); *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1486 (11th Cir. 1989) ("The term . . . 'damage sustained' is "entirely compensatory in tone."), *rev'd on other grounds*, 499 U.S. 530, 550 (1991).

In *Baas*, the Eighth Circuit interpreted a provision of the Consumer Product Safety Act that stated " '[a]ny person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule . . . shall recover damages sustained.' " 766 F.2d at 1192 (quoting 15 U.S.C. § 2072) (alterations in original). Reversing an award of punitive damages because they were not "damages sustained," the court held, "[i]nterpreting this language according to its ordinary meaning, the statute provides for recovery of compensatory and not punitive damages." *Id.* at 1195; *see also, e.g., Carter v. Agric. Ins. Co.*, 72 Cal. Rptr. 462,

464 (Ct. App. 1968) ("The attachee does not sustain punitive or exemplary damages. . . . We believe damages sustained by the attachee mean those suffered by him, his actual damages, to compensate him for the losses he has endured.").

Given this consistent history of usage, Congress' adoption of the term "damages sustained" cannot be viewed in a vacuum. Whether the Court interprets the term "damages sustained" according to its "ordinary meaning" or views it as a term of art, the result is the same: it refers to compensatory damages only. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (when statute does not provide a definition, courts "construe a statutory term in accordance with its ordinary or natural meaning"); *Molzof v. United States*, 502 U.S. 301, 306-07 (1992) (" 'Punitive damages' is a legal term of art that has a widely accepted common-law meaning. . . . '[W]here Congress borrows terms of art . . . it presumably knows and adopts the cluster of ideas that were attached . . . and the meaning its use will convey to the judicial mind unless otherwise instructed.' ") (citation omitted).

Nor should the waiver provision be viewed without reference to ATSSSA itself. That Congress meant "damages sustained" to refer to compensatory damages is confirmed by examining the words Congress chose to refer to both compensatory and punitive damages together. As noted, § 408(b)(1) creates a "Federal cause of action *for damages* arising out of" the September 11th attacks (emphasis added). Section 408(a)(1), as amended,[6] limits the liability of air carriers, aircraft makers, and other

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[6] On November 19, 2001, Congress enacted the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001), which, *inter alia*, amended ATSSSA § 408(a) to extend the limitation on air carrier liability to other related air transportation industry entities, as stated in the text. *Id.*, § 201(b)(3).

related entities for lawsuits brought under § 408(b)(1), "whether for compensatory or punitive damages," to the amount of their insurance coverage. The word "damages" in these sections is used as a collective noun referring in context to both compensatory and punitive damages. If Congress had intended § 405(c)(3)(B)(i) to waive claims for all types of damages, it would have used either of the two verbal formulae found in § 408 to refer to both types of damages and would not have restricted the scope of "damages" by adding the word "sustained."[7]

B. The Court of Appeals' Holding that Waiver of a Claim for "Damages Sustained" Is the "Functional Equivalent" of a Release of All Claims, Damages, and Causes of Action is Contrary to the Decisions of the Court and the Courts of Appeals

In the face of the unanimous case law holding that the term "damages sustained" refers only to compensatory damages, to the exclusion of punitive damages, the court of appeals at one point in its opinion appeared to acknowledge that a civil action for "damages sustained" means "only a claim to be made whole" (20a). Nonetheless, the court resisted the logic that a waiver limited to "damages sustained" only extinguishes claims for compensatory damages. Instead, the court concluded that petitioners' participation in the VCF waived their wrongful death claims for punitive damages.

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[7] The limitation of liability for air carriers and related entities in § 408(a)(1) to the amount of their insurance coverage insures that lawsuits brought for punitive damages, even against the air transport industry and even by those who waived claims for compensatory damages or "damages sustained" under § 405(c)(3)(B)(i), would not defeat the purpose of ATSSSA by bankrupting that industry.

The court erred by conflating waiver of petitioners' claim for compensatory damages with waiver of the underlying cause of action that supports *both* compensatory *and* punitive damages. Petitioners' complaint seeks punitive damages against Motorola for wrongful death. The waiver provision, limited to "the right to file a civil action . . . for [compensatory damages]," § 405(c)(3)(B)(i), neither encompasses that entire cause of action nor the remedy of punitive damages that it supports.

The court of appeals attempted to overcome that lack of congruence by, *ipse dixit*, deeming petitioners' application to the VCF "the functional equivalent of the satisfaction and release in *Rocanova* [*v. Equitable Life Assurance Soc'y*, 83 N.Y.2d 603 (1994)]" (21a). The court's analogy, however, only highlights the discrepancy between the actual language of the statute providing for waiver and the panel's interpretation of that language. In stark contrast to the statutory waiver provision in this case, the *Rocanova* plaintiff "released defendant from '*all* debts, claims, demands, damages, actions and causes of action' related to the facts at issue in the case." *Id.* (quoting *Rocanova*, 83 N.Y.2d at 616) (emphasis added). By construing the scope of the term "damages sustained" in ATSSSA § 405(c)(3)(B)(i) as extending to all claims, damages, and causes of action, the court of appeals fundamentally departed from the unanimous body of case law set forth above.

C. The Court of Appeals' Decision Does Not Turn on a Question of New York Law, But Rather on its Construction of ATSSSA § 405(c)(3)(B)(i)

While §408(b)(1) creates an exclusive federal cause of action, ATSSSA provides that the substantive law to be applied is the law of the place where "the crash[es] occurred." § 408(b)(2). In this case that place is New

York. Relying exclusively on the decision of the New York Court of Appeals in *Rocanova* (21a-22a), the court of appeals held that petitioners could not proceed with an action that sought only punitive damages. The court of appeals' conclusion, however, depended entirely on its fundamental underlying misconstruction of the scope of the term "damages sustained" in ATSSSA § 405(c)(3)(B)(i) itself. By equating the waiver of claims for "damages sustained" in ATSSSA § 405(c)(3)(B)(i) with the release of "all . . . claims, . . . damages, actions and causes of action" that was executed in *Rocanova*, the court inevitably and unremarkably concluded that New York law would bar a lawsuit by petitioners for punitive damages. If the term "damages sustained" were given its otherwise universal meaning and scope, *Rocanova* is irrelevant and meaningless. Thus the court of appeals' misconstruction of New York law is dependent entirely on its fundamental error in interpreting the waiver provision of ATSSSA.

Cases from the arbitration context, closely analogous to the current case, reflect that a plaintiff who has not waived his entire cause of action may bring a lawsuit seeking only punitive damages. Just as the petitioners here could not pursue punitive damages before the VCF, § 405(b)(5), plaintiffs in arbitrations similarly are limited to compensatory damages. Nonetheless, New York appears to recognize that such a plaintiff, after receiving an arbitration award, still has a cause of action which permits him to pursue a claim for punitive damages in the courts "even though plaintiff is precluded from recovering compensatory damages on that substantive cause of action." *Mulder v. Donaldson, Lufkin & Jenrette*, 623 N.Y.S.2d 560, 565 (App. Div. 1995).[8] *See also*

[8] The court of appeals was wrong in distinguishing *Mulder* by suggesting it "addressed the issue of whether a plaintiff may seek

Wussow v. Commercial Mechanisms, Inc., 293 N.W.2d 897, 900 (Wis. 1980) (Upholding trial verdict for punitive damages: "The fact that there was a settlement and payment of the claim for compensatory damages in no way affected the continued existence of the cause of action based on operative facts which could give rise to multiple or alternative remedies").

At the least, because *Mulder* was only a New York Appellate Division case, and there exists "no controlling precedent of the [New York] Court of Appeals," N.Y. Ct. of Appeals R. 500.17(a), and because this is a "significant question of state law that will control the outcome" of this case, Second Circuit Local R. Relating to Organization of Ct. § .027, the Second Circuit should have granted petitioners' request to certify to the New York Court of Appeals the question of whether a plaintiff can pursue a cause of action for punitive damages alone where the plaintiff's compensatory damages, but not his entire cause of action, has been satisfied. To the extent its decision relied on New York law, it was incumbent on the court of appeals to do so given that ATSSSA mandated that this action be brought in federal court while providing that the state substantive law of the place of the crashes apply. *See Lehman Brothers v. Schein*, 416 U.S. 386, 391-92 (1974) (vacating court of appeals' judgment and remanding "so that the court of appeals may reconsider whether the controlling issues of Florida law should be certified to the Florida Supreme Court");

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punitive damages after receiving an award from an arbitrator premised on a determination of fault by that arbitrator" (22a, n. 13). This is a spurious distinction on which *Mulder* in no way rests. *Mulder* expressly declared that " 'leaving it to the arbitrators to decide whether any wrongdoing occurred and to the courts to decide on the appropriate measure of punishment . . . is unworkable.' " 623 N.Y.S.2d at 565 (quoting *Belco Petroleum Corp. v. AIG Oil Rig, Inc.*, 565 N.Y.S.2d 776, 785 (App. Div. 1991)).

Belotti v. Baird, 428 U.S. 132, 150-151 (1976) (district court should have certified question of state law to Massachusetts Supreme Judicial Court); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring) ("Speculation by a federal court about the meaning of a state statute in the absence of a prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court").

The court of appeals in this case never reached the question of whether New York law would permit a lawsuit for punitive damages where the plaintiff had *not* waived such a claim, because its fundamental misconstruction of ATSSSA's "damages sustained" waiver led it to conclude, without warrant, that petitioners *had waived* their entire causes of action, including for punitive damages. Therefore, to the extent a question of New York law remains once the term "damages sustained" is construed properly to mean only compensatory damages, the Court, as in *Belotti*, should remand with directions to the court of appeals to certify the question, particularly given the unique circumstance that petitioners never had a choice to sue in state court.

CONCLUSION

It is strongly in the public interest that the Court review these compelling legal issues. The events of September 11 were the most traumatic this Nation has suffered in over a half century. The firefighters who lost their lives in the towers were national heroes, as were the police and security workers. Unlike the latter two groups, however, only the firefighters did not receive the mayday warnings to evacuate the North Tower, and only

the firefighters were lost when that tower collapsed. The reason: they and they alone were still using the same faulty Motorola analog radios that had failed at the World Trade Center in 1993. Motorola has never been held accountable for the culpable actions alleged. No punishment or sanction has been imposed to deter it or others from engaging in similar acts, or to express the community's anger at or disapproval of its action.

Petitioners submit that the court of appeals abandoned its responsibility to insure that the public is confident in the fair, just and equal application of ATSSSA and fundamentally misconstrued and misapplied the Act in dismissing petitioners' effort to hold defendants accountable and responsible.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

04-1942-cv
Filed July 15, 2005

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 15th day of July two thousand five.

VIRGILIO v. CITY OF NEW YORK

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Geraldine Halderman, Eileen Tallon, Gergard J. Prior, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: ARTHUR HELLER
Motion Staff Attorney

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: March 16, 2005 Decided: April 29, 2005)

Docket No. 04-1942-cv

LUCY VIRGILIO, Personal Representative of Lawrence Virgilio,

Plaintiff,

GERALDINE HALDERMAN, Personal Representative of Lt. David Halderman, EILEEN TALLON, Personal Representative of Sean Patrick Tallon, GERGARD J. PRIOR, Personal Representative of Kevin M. Prior, CATHERINE REGENHARD, Personal Representative of Christian Regenhard, MAUREEN L. DEWAN-GILLIGAN, Personal Representative of Gerard P. Dewan, JAMES BOYLE, Personal Representative of Michael Boyle, BARBARA BOYLE, Personal Representative of Michael Boyle, EDWARD SWEENEY, Personal Representative of Brian Sweeney, GERALD JEAN-BAPTISTE, Co-Personal Representative of Gerard Jean Baptiste, Jr., ALEXANDER SANTORA, Personal Representative of Christopher Santora, MAUREEN SANTORA, Personal Representative of Christopher Santora, RAFFAELA CRISCI, Personal Representative of John A. Crisci and PATRICIA DEANGELIS, Personal Representative,

Plaintiffs-Appellants,

—v.—

CITY OF NEW YORK and MOTOROLA, INC.,

Defendants-Appellees.

Before:

NEWMAN, STRAUB, and WESLEY,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Hellerstein, J.), entered on April 12, 2004, dismissing plaintiffs' complaint, which alleged negligent and intentional tortious conduct against Motorola, Inc. and the City of New York, individually and in concert, in failing to provide adequate communications equipment to New York City firefighters that allegedly could have prevented the deaths of those firefighters who died while responding to the terrorist-related attacks of September 11, 2001, at the World Trade Center in lower Manhattan.

AFFIRMED.

ERIC M. LIEBERMAN (Carrie Corcoran, Keith M. Donoghue, *on the brief*) Rabinowitz, Boudin, Standard, Krinsky & Lieberman, New York, New York (Richard Salem, Salem Law Group, Tampa, Florida, William A. Reppy, Jr., Charles L.B. Lowndes Emeritus Professor of Law, Duke University School of Law, Durham, North Carolina; William Van Alstyne, Lee Proffessor of Law, Marshall-Wythe School of Law,

Williamsburg, Virginia, *on the brief*), *for Plaintiffs-Appellants*.

BELINA ANDERSON (Michael A. Cardozo, Corporation Counsel, Kenneth A. Becker, *on the brief*) Corporation Counsel of the City of New York, New York, New York, *for Defendant-Appellee the City of New York*.

MICHAEL D. SCHISSEL, Arnold & Porter LLP, New York, New York, *for Defendant-Appellee Motorola, Inc.*

WESLEY, *Circuit Judge*:

In a series of tragic and terrifying attacks on September 11, 2001, terrorists killed thousands in Pennsylvania, Virginia, and New York, caused extensive damage to the Pentagon, and brought about the collapse of the North and South Towers of the World Trade Center ("WTC"). As with other catastrophes, true heros responded, not the least among them the brave firefighters, police, and first-response units of the City of New York. Plaintiffs are the personal representatives of firefighters who lost their lives in responding to the WTC following the attacks. Plaintiffs' complaint focuses on the failure of radio-transmission equipment in the North and South Towers that prevented firefighters from receiving evacuation orders before the Towers' collapse. Plaintiffs commenced this action for wrongful death against New York City (the "City") on December 22, 2003, and filed an amended complaint as of right on January 20, 2004, that added Motorola, Inc. ("Motorola") as a defendant.

Plaintiffs claim that Motorola negligently and intentionally provided the City with radio-transmission communication equipment for firefighters that Motorola knew to be ineffective in high-rise structures like the Towers of the WTC, that Motorola made fraudulent material misrepresentations to secure contracts with the City, and that those acts and representations caused decedents' deaths.[1] Plaintiffs also press a series of wrongful death claims against the City based upon its alleged failure to meet duties imposed on the City under New York law to provide adequate and safe radio-transmission equipment.[2] Finally, in Count 8 of the Amended Complaint, plaintiffs allege that the City and Motorola engaged in concerted action in an attempt to deprive firefighters of adequate protection and to "engage in fraudulent misrepresentations and deceitful conduct."

Shortly after the disaster, Congress passed the Air Transportation Safety and System Stabilization Act (the "Air Stabilization Act" or the "Act"). Pub. L. No. 107-42, 115 Stat. 230 (2001). The statute limited liability for the air carriers involved in the tragedy to their insurance coverage, *see* Air Stabilization Act § 408(a); created the Victim Compensation Fund (the "Fund") to provide no-fault compensation to victims who were injured in the attacks and to personal representatives of victims killed in

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[1] Four Counts of the Amended Complaint allege specific torts against defendant Motorola. Count Four alleges a wrongful death claim based upon design defects in radio-transmission equipment provided by Motorola; Count Five alleges a claim for wrongful death for the failure to warn of shortcomings in the radio equipment; Count Six alleges a wrongful death claim due to fraudulent misrepresentation, and Count Seven alleges a wrongful death claim due to negligent misrepresentations.

[2] Three Counts of the complaint allege wrongful death for the breach of statutorily imposed duties by the City.

the attacks, *see id.* §§ 402(3), 405(a)(1), (b), (c); and provided an election of remedies—all claimants who filed with the Fund waived the right to sue for injuries resulting from the attacks except for collateral benefits, *see id.* § 405(c)(3)(B)(i). On November 19, 2001, the Act was amended by the Aviation and Transportation Security Act (the "Aviation Security Act"). Pub. L. No. 107-71, 115 Stat. 597 (2001). Significantly, the amendments extended liability limits to aircraft manufacturers, those with a proprietary interest in the WTC, and the City of New York, *see id.* § 201(b), while allowing Fund claimants to sue individuals responsible for the attacks notwithstanding the waiver, *see id.* § 201(a).

Under the Act, the final date by which claimants could submit claims to the Fund was December 22, 2003. *See* Air Stabilization Act §§ 405(a)(3), 407; 28 C.F.R. 104.62. The Special Master appointed to oversee the Fund, Kenneth R. Feinberg, extended the filing date to January 22, 2004, for those claimants who previously submitted incomplete claims. The Special Master promulgated an application form that notified claimants of the waiver provision and required claimants to sign an acknowledgment of waiver. The acknowledgment of waiver tracked the language of the statutory waiver provision.

A number of September 11-related cases were consolidated before Judge Hellerstein.[3] On December 19, 2003,

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[3] One category encompassed cases alleging "wrongful death, personal injury, and property damage against the airlines, the airport security companies, the plane manufacturer, and the owners and lessees of the World Trade Center" under the caption *In re September 11 Litigation*, No. 21 MC 97(AKH) (S.D.N.Y. filed Nov. 1, 2002); the other encompassed "cases alleging respiratory injuries against the City of New York, the Port Authority of New York and New Jersey, and the contractors that were engaged to demolish, cart away and clean up the debris of the destroyed buildings." *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 362-363 & nn.2-3 (S.D.N.Y. 2003).

Judge Hellerstein issued an order addressing when the waiver via assertion of Fund claims would become effective. *See In re September 11 Litig.*, 21 MC 97, 2003 WL 23145579 (S.D.N.Y. Dec. 19, 2003). Judge Hellerstein held that "submission" of Fund claims—triggering the waiver provision—occurs on the earlier of when a Fund filing is substantially complete as determined by the Special Master or January 22, 2004. *Id.* at *2.

A day after filing their amended complaint, plaintiffs moved by Order to Show Cause on January 21, 2004, asking that the court permit them to continue their lawsuit against defendants despite having filed claims with the Fund. Alternatively, plaintiffs asked the court to stay Judge Hellerstein's earlier orders—which required that cases brought by 9/11 victims with Fund awards pending as of January 22, 2004, be dismissed—or to place their case on the suspense docket of the consolidated *In re September 11 Litigation* docket until a general consolidated conference previously set by Judge Hellerstein for February 6, 2004, took place.[4] Because of the January 22nd deadline for completing previously filed but incomplete Fund claims, Judge Haight held a hearing on the 22nd on the motion and issued a ruling from the bench finding that the statute's waiver provision barred the suit against the City or Motorola: " 'the plaintiffs' claims against both the City and Motorola are subject to the limitation on civil actions

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[4] While the facts of this case are similar to those of cases consolidated before Judge Hellerstein in *In re September 11 Litigation*, 21 MC 97(AKH), *see In re World Trade Center Disaster Site Litig.*, 270 F. Supp. 2d at 362-63 & n.2, this case was assigned to Judge Berman by lot after plaintiffs filed the original complaint on December 22, 2003, *see Virgilio v. Motorola, Inc.*, 307 F. Supp. 2d 504, 507 (S.D.N.Y. 2004). Judge Haight heard plaintiffs' Order to Show Cause submitted on January 21, 2004, sitting in Part I. *See Virgilio*, 307 F. Supp. 2d at 507-09.

provided for in Section 405(c)(3)(B)(i) of the statute.'" *Virgilio v. Motorola, Inc.*, 307 F. Supp. 2d 504, 514 (S.D.N.Y. 2004) (Haight, J.) (quoting transcript).

On January 29, 2004, Judge Haight issued a detailed decision that set forth his reasons for finding that plaintiffs' claims were barred as a result of their decision to file with the Fund. *See id.* at 514-20. Although the court denied the relief requested in the Order to Show Cause on a finding that the waiver provision barred plaintiffs' claims, it did not dismiss the amended complaint as defendants had yet to file answers and had little time to oppose the Order to Show Cause other than through argument of counsel before Judge Haight. Because plaintiffs' case raised 9/11 claims similar to those in *In re September 11 Litigation*, Judge Haight transferred the case to Judge Hellerstein's "suspense docket" of the consolidated *In re September 11 Litigation* docket. *Id.* at 521.[5]

On January 30, 2004, the next day, the City moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) or for summary judgment on several grounds, including the Act's waiver provision; the expiration of the statute of limitations for wrongful death actions against

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[5] The "suspense docket" was created to deal with a statute of limitations problem faced by many 9/11 plaintiffs. Because the New York statute for wrongful death generally ran two years after death—i.e. September 11, 2003—and because the Fund set a limitations period of December 22, 2003, plaintiffs faced a choice of whether to elect a claim under the Fund well in advance of the expiration date or whether to meet the statute of limitations for their wrongful death actions. *See* N. Y. EST. POWERS & TRUST LAW § 5-4.1(1) (1999). The "suspense docket" stayed plaintiffs' filed claims while they evaluated whether to seek compensation through the Fund. New York amended the Estates Powers & Trust Law in 2003 to provide a two and a half year statute of limitations under § 5-4.1(1) for victims of the WTC attacks effective July 1, 2003. *See id.* (2005 Supp.); 2003 N.Y. LAWS, ch. 114 § 1.

municipalities; and plaintiffs' failure to serve timely notices of claim against the City. Motorola moved to dismiss the amended complaint on the ground of waiver.

Judge Hellerstein dismissed the complaint in an unpublished decision. *See Virgilio v. Motorola, Inc.*, No. 03 Civ. 10156(AKH), 2004 WL 433789 (S.D.N.Y. Mar. 10, 2004). The district court adopted Judge Haight's decision noting that "the waiver provision applies to [ ] all of the claims against Motorola and the City of New York . . . . As plaintiffs have elected their remedy, they have also waived the right to bring a civil action 'for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001.'" *Id.* at *2 (quoting Air Stabilization Act § 405(c)(3)(B)(i)).

Plaintiffs appealed, and we now affirm.

Discussion

When confronted with an appeal from the dismissal of a complaint, we review the matter anew, *see, e.g.*, *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir. 2000), and take as true the complaint's allegations. A complaint may be dismissed for failure to state a claim only if there are no legal grounds upon which relief may be granted. *See Jacobs v. Ramirez*, 400 F.3d 105, 106 (2d Cir. 2005); Fed. R. Civ. P. 12(b)(6). The task at hand reduces itself to examining the statute and assessing its impact on this case.

A. Statutory Scheme

The Air Stabilization Act establishes the Fund and delegates to the Attorney General the authority to appoint a Special Master to oversee victim compensation. *See* Air Stabilization Act §§ 401-09. As Congress noted, one purpose of the Fund is "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-

related aircraft crashes of September 11, 2001." *Id.* § 403. However, eligibility for Fund payment "is conditioned upon a waiver by claimants of 'the right to file any civil action' in state or federal court" except for civil actions against those responsible for the attack or to recover collateral source obligations. *Schneider v. Feinberg*, 345 F.3d 135, 139 (2d Cir. 2003) (quoting Air Stabilization Act § 405(c)(3)(B)). Because the Act seeks to provide quick no-fault compensation decisions for victims while capping the litigation exposure of front-line defendants, it is quite clear that the Act's "general purpose is to protect the airline industry and other potentially liable entities from financially fatal liabilities while ensuring that those injured or killed in the terrorist attacks receive adequate compensation." *Canada Life Assurance Co. v. Converium Rückversicherung (Deutschland) AG*, 335 F.3d 52, 55 (2d Cir. 2003) (citing 147 Cong. Rec. S9594 (daily ed. Sept. 21, 2001) (statement of Sen. McCain)).

Sections 405 and 408(b) set forth general guidelines and requirements for Fund claims and create a federal cause of action for claims relating to 9/11. *See id.* §§ 405, 408(b). Section 405(c)(3)(B)(i) contains the waiver provision central to this case:

> (B) LIMITATION ON CIVIL ACTION.—
>
> (i) IN GENERAL.—Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations, or to a civil action against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

(as amended by the Aviation Security Act, § 201(a)).

While section 405 creates a system for determining Fund eligibility outside of the litigation context, section 408 funnels all civil litigation for actions "resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001" into the Southern District of New York by granting that court "original and exclusive jurisdiction" over such actions, *id.* § 408(b)(3), and provides that the "substantive law for decision in any such suit shall be derived from the law . . . of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law," *id.* § 408(b)(2). As noted above, section 408 caps the liability of air carriers, aircraft manufacturers, holders of proprietary interests in the WTC, and the City. *See id.* § 408(a), 408(a)(1), 408(a)(3); Aviation Security Act § 201(b).

B. Statutory Waiver Provision: Air Stabilization Act § 405(c)(3)(B)(i)

We agree with the district court that under the plain language of the statute, claimants who have filed claims with the Fund have waived "the right to file a civil action . . . for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001" and that the waiver bars claims for "damages sustained" against non-airline defendants. We affirm the district court's determination and find plaintiffs' claim barred by their election of remedies.

Plaintiffs assert that the waiver provision does not apply to claims against the defendants because the correct interpretation of that section bars suits against only the airplane-transportation industry. Plaintiffs present three arguments to support their contention: they assert that the district court misinterpreted Congress's purpose in enacting the Air Stabilization Act; that the waiver provision should be examined in the context of its relationship to the

statute and subsequent amendments to the Air Stabilization Act; and that the legislative history of the waiver provision supports a narrower interpretation of that provision than that employed by the district court. The City and Motorola counter that the plain language unambiguously bars the current suit and that the legislative history of the Act further supports their view.

When interpreting a statute, the "first step . . . is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.' " *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)). Further, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) and *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). Thus, we begin with the language of the statute itself.

In our view, the waiver provision is unambiguous. The language of the waiver provision clearly states that Fund claimants waive their right to bring civil actions resulting from any harm caused by the 9/11 attacks: "[u]pon the submission of a claim . . . , the claimant waives the right to file a civil action . . . in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001." Air Stabilization Act § 405(c)(3)(B)(i). The waiver provision plainly requires litigants to choose between risk-free compensation and civil litigation. If this waiver provision is ambiguous as plaintiffs suggest, few if any statutory provisions could be viewed as clear.

The overall structure of the Act highlights two predominate concerns: to insulate the airline industry from massive —virtually limitless—liability arising from the sudden and devastating acts of wanton cruelty on 9/11 and to provide an adequate no-fault system of compensation to victims. *See Canada Life Assurance Co.*, 335 F.3d at 55. The statute balanced the certainty of a no-fault recovery against the relinquishment of one's right to bring a federal action—created by the statute—for injuries arising from the disaster. *See Schneider*, 345 F.3d at 139; *Canada Life Assurance Co.*, 335 F.3d at 55 (noting Fund compensation "in exchange for a waiver of their rights to file a civil action"); *cf.* § 408(b) (creating a federal cause of action for "damages arising out of the hijacking"). Without the Act, victims and their families could seek compensation only through litigation in state or federal courts. The terrorists carried out four separate attacks in three locations—two of which involved the damage or destruction of government and office buildings and a concomitant loss of lives within those structures and the areas adjacent to them. Thus, the number of plaintiffs, possible defendants, and theories of recovery were as diverse as the confluence of misfortunes that befell each victim. Moreover, the litigation scatter pattern presented the possibility of lawsuits in state and federal courts nationwide.[6]

While the potential liability to the air carriers and airplane manufacturers involved was monumental, the prospect for recovery by the victims and their families was not certain. A verdict against the air carriers or other potential defendants, such as the City or Motorola, was not

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[6] *See* 147 Cong. Rec. S9594 (daily ed. Sept. 21, 2001) (statement of Sen. McCain) ("It is regrettable, but perhaps inevitable, that the unity that this terrorist attack has wrought will devolve in the courts to massive legal wrangling and assignment of blame among our corporate citizens.").

guaranteed. In addition, the scope of liability was so substantial that the prospect of Bankruptcy Court for the air carriers was real. In order to provide the certainty of recovery for victims and their families, Congress created the Fund, which provides loss-based awards without an assessment of fault or responsibility for the loss.[7] All the victims or their representatives need establish is presence at the site of a 9/11 attack and physical injury or death as a result of the attacks. *See* Air Stabilization Act § 405(c)(2).

The Act centralizes the victims' litigation claims in one federal court while applying the substantive state law of the locus of the injury. It recognizes that the airline industry might not be able to withstand the litigation tidal wave the attacks would create. It also recognizes that such an onslaught would likely leave many victims and their families waiting years, while blame for the attacks and the resulting injuries is parsed out among hundreds of defendants leaving plaintiffs to recover only a small pro rata share of a fair award in Bankruptcy Court. Thus, the statute carries out a careful balancing of a number of important interests. It gives claimants a reasonable choice between an administrative claim or litigation centralized in one court in which the primary defendants would have limits to their

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[7] Senator McCain stated that the purpose of the Air Stabilization Act was:

> To ensure that the victims and families of victims who were physically injured or killed on September 11th are compensated even if courts determine that the airlines and any other potential corporate defendants are not liable for the harm; if insurance monies are exhausted; or are consumed by massive punitive damage awards or attorneys' fees, the bill also creates a victims' compensation fund. These victims and their families may, but are not required to, seek compensation from the Federal fund *instead* of through the litigation system.

147 Cong. Rec. S9594 (daily ed. Sept. 21, 2001) (emphasis added).

exposure. In our view, there is no inconsistency in compensating victims and their families at a price of complete litigation peace.

It is clear to us that plaintiffs' claims are within the scope of the waiver provision. Here, plaintiffs damages arose "as a result" of the terrorist-related attacks. Plaintiffs assert that the waiver should not reach defendants' alleged tortious conduct. In plaintiffs' view, defendants' acts independently caused plaintiffs' injuries. But, in fact, the injuries to plaintiffs and their loved ones resulted from a series of interrelated events that began with the terrorist attack. Even assuming independent, successive tortious acts by both the terrorists and defendants, as we must on this motion to dismiss, we are hard pressed to find plaintiffs' damages did not *result*—at least in part—from the terrorist attacks.

Indeed, plaintiffs overlook the very language of the statute that defines their eligibility for compensation for the Fund. The Act provides that anyone, or their relative, who was present at and injured or killed *as a result* of the terrorist-related aircraft crashes of September 11, 2001, may file a claim with the Fund. *See* Air Stabilization Act § 405(c)(2). In our view, plaintiffs cannot embrace the statute's broad view that many people, in widely differing circumstances, died "as a result" of the attacks while simultaneously constricting the same language in the waiver to include only the airlines. *Compare id.* § 405(c)(2) *with id.* § 405(c)(3)(B)(i).

Plaintiffs also contend that amendments to the Air Stabilization Act reveal the limited scope of the waiver provision. This argument continues to ignore the plain language of the waiver and confuses the effect of the amendments. On November 19, 2001, Congress amended the Air Stabilization

Act in two significant respects.[8] Section 201(a) of the Aviation Security Act altered the exception in the waiver provision to allow "civil action[s] against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act." Thus, Fund claimants have not waived their right to sue those responsible for the attacks. Certainly, had Congress chosen to constrict the scope of the waiver further, as plaintiffs would have us do, it could have done so—it did not.

The amendment also altered section 408. As originally enacted, this section capped the airlines' liability for compensatory and punitive damages at the level of insurance carried by the airlines. *See* Air Stabilization Act § 408(a). Thus, even if a plaintiff chose to pursue civil litigation over filing a Fund claim, the airlines' exposure in federal court would not exceed their coverage. The amendment brought the City (and others) within the protection of the liability cap:

> Liability for all claims, whether for compensatory or punitive damages or for contribution or indemnity arising from the terrorist-related aircraft crashes of September 11, 2001, against the City of New York shall not exceed the greater of the city's insurance coverage or $350,000,000. If a claimant . . . submits a claim under section 405, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001, including any such action against the City of New York.

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[8] *See* Aviation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (Nov. 19, 2001).

Aviation Security Act § 201(b)(2) (amending Air Stabilization Act § 408(a) and adding § 408(a)(1), (3)).[9]

Plaintiffs contend that the amendment's repetition of the waiver language in the liability-limiting section indicates that the protection of section 405's waiver provision is limited to actions against airline industry-related defendants. They argue that had the waiver included the City before the amendment, there would be no need to mention the waiver when limiting the City's exposure in federal court. In essence, plaintiffs would define the sweep of the waiver by the scope of the limitation of liability sections of the statute. That ignores the fact that the language of the waiver is broad and unlimited while the limitation of liability provision is specific. It also ignores the purpose and effect of each provision.

Limitations on liability are just that. They are caps on recoveries in litigation against defendants facing primary, stunning exposure by nonclaim-filing plaintiffs. The waiver provision on the other hand seeks to force a choice between a risk-free claim with the Fund or a lawsuit in federal court. Thus, a plaintiff who elects litigation still faces the prospect that the primary defendants will exhaust their coverage—and their liability—before plaintiff achieves a verdict, while a plaintiff choosing the certainty of the Fund does so at the cost of releasing all his claims with only limited exceptions.

Contrary to plaintiffs' argument, neither the extension of limited liability to the City nor the inclusion of waiver language in that extension support the assertion that the waiver provision of section 405 protects only the airlines or the air-transportation industry. The restatement of the

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[9] When Congress amended the Act in November 2001 it extended the liability cap not only to the City but also to aircraft manufacturers and persons with a proprietary interest in the WTC. *See* Aviation Security Act § 201(b).

waiver did not pronounce a new extension of the waiver to the City, nor did it introduce an ambiguity into the clear and concise waiver provision. The clause notes that the filing of a claim waives one's right to bring an action in federal court for injuries resulting—in part—from the terrorist attacks against anyone, including the City, other than collateral-source obligors or those responsible for the attacks. *See* Air Stabilization Act § 408(b)(3) (as amended by Aviation Security Act § 201(b)). In our view, the amendments reinforce the view that the plain and broad language of section 405(c)(3)(B)(i) already encompassed any claim for damages sustained as a result of the terrorist-related aircraft crashes.[10]

C. Scope of Waiver for "Damages Sustained" and Viability of Any Remaining Claim to Punitive Damages Under New York Law

Plaintiffs assert that even if the waiver provision applies to the City and Motorola, the waiver refers only to compensatory damages. They contend that under New York law they may maintain an action solely for punitive damages against the City and Motorola. Defendants counter that this argument, not offered below, is waived; that the plain meaning of "damages sustained" bars any civil recovery; and that New York law bars plaintiffs from suing solely for punitive damages without a concomitant claim for compensatory damages.

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[10] Having concluded that the language of the statute is clear and unambiguous notwithstanding the subsequent amendments, we see no need to examine the statute's legislative history as plaintiffs urge us to do. *Cf. Robinson*, 519 U.S. at 340. We do note that the prior efforts of our Court in that regard weigh heavily against plaintiffs' contention. *See Schneider*, 345 F.3d at 139; *Canada Life Assurance Co.*, 335 F.3d at 55.

Defendants are correct that plaintiffs failed to raise any argument about the scope of the waiver as it relates to a claim for punitive damages. "In general we refrain from passing on issues not raised below." *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 103 (2d Cir. 2004) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). Despite the general rule, however, this Court retains broad discretion to consider such issues because waiver rules are prudential and not jurisdictional. *Id.* (citing *Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996)). This Court "may rule on issues not raised in the district court . . . when the issues are solely legal ones not requiring additional factfinding." *Id.* (citing *Baker v. Dorfman*, 239 F.3d 415, 420-21 (2d Cir. 2000)). Plaintiffs' arguments present pure questions of law—the meaning of a statutory term and New York's law of punitive damages. In light of the potential for others to raise similar arguments, we see no need to delay the law-based decision.

Plaintiffs rely on several cases interpreting statutory phrases similar to "damages sustained" as identifying only "compensatory damages."[11] Compensatory damages are just that; they compensate the injured victim for injuries actually endured. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)). Thus legislation granting a prospective plaintiff a claim for damages sustained would seem to

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[11] Plaintiffs rely on *Local 20, Teamsters v. Morton*, 377 U.S. 252, 260 & nn. 15-16 (1964), and *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1280-83 (2d Cir. 1991), *overruled on other grounds Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 229 (1996). Both cases dealt with the issue of whether the grant of a right to "damages sustained" or language similar to "damages sustained" included a right of recovery for punitive damages. Both courts limited recovery to compensatory damages.

imply that the statute authorized only a claim to be made whole. Plaintiffs contend that while the waiver provision extinguishes claims, it does so only as to claims for damages sustained—claims for compensatory damages. Plaintiffs' argument has some appeal; however, it overlooks the essential nature of punitive damages under New York law.

The Act invokes the substantive law of the State of injury. *See* Air Stabilization Act § 408(b)(2). Thus, all parties agree that New York law decides plaintiffs' entitlement to punitive damages. While compensatory damages recompense for one's injuries, punitive damages under New York law serve an entirely different purpose. Punitive damages are invoked to punish egregious, reprehensible behavior. *See Walker v. Sheldon*, 10 N.Y.2d 401, 404-05 (1961). Although punitive damages must have some relationship to the conduct for which the punishment is imposed, they do not seek to make the injured victim whole. *See Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 357-58 (1977); *see also Rocanova v. Equitable Life Assurance Soc'y of U.S.*, 83 N.Y.2d 603, 616-17 (1994). They serve as an enforcement mechanism invoked by private citizens to accomplish public policy objectives—responsible behavior in the marketplace or where otherwise appropriate. *See Walker*, 10 N.Y.2d at 404; *Rocanova*, 83 N.Y.2d at 613. But, while punitive damages are not curative in nature, under New York law they cannot be invoked without some compensatory injury.[12] *See*

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[12] Although this Court has previously considered the ability of a plaintiff to receive punitive damages despite a jury verdict in which no compensatory damages were explicitly awarded, *see King v. Macri*, 993 F.2d 294, 297-98 (2d Cir. 1993), that case is of no help to plaintiffs for several reasons. *King* did not employ New York law; the case involved a section 1983 claim. *Id.* at 296-97. In *King* the jury was charged without objection that it could award punitive damages

Rocanova, 83 N.Y.2d at 616-17 (1994); *see also Hubbell v. Trans World Life Ins. Co.*, 50 N.Y.2d 899, 901 (1980). Once a claim for compensatory injuries is barred, the possibility of a punitive award is likewise relinquished.

In *Rocanova*, the New York Court of Appeals addressed the relationship between the viability of a claim underlying a request for compensatory damages and the availability of the remedy of punitive damages. *See* 83 N.Y.2d at 616. Plaintiff alleged four causes of action based on "unfair claim settlement practices" by the defendant insurance company. *Id.* Plaintiff entered into a settlement that released defendant from "all debts, claims, demands, damages, actions and causes of action" related to the facts at issue in the case. *Id.* The court held that where the cause of action for compensatory damages that served as the predicate for punitive damages was barred by a release, no claim for punitive damages would lie. *See id.* The court was clear: "in light of our conclusion that the release bars [plaintiff's] remaining causes of action, [plaintiff] cannot recover punitive damages since [plaintiff] is unable to assert an underlying cause of action upon which a demand for punitive damages can be grounded. *A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action.*" *Id.* (emphasis added).

In our view the statutorily imposed waiver—set out in the acknowledgment each plaintiff signed when they filed their Fund claim—is the functional equivalent of the satisfaction and release in *Rocanova*. Under the language of the statute, plaintiffs have waived their right to file "a

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"regardless of whether plaintiff has established actual damages." *Id.* at 297. Finally, and most importantly, *King* involved a jury verdict, it did not extrapolate the effect of a release of a compensatory claim on the viability of a request for punitive damages arising out of the same conduct. *See id.*

civil action" for damages sustained. Plaintiffs had a right to seek damages to redress the wrongs they and their loved ones suffered through a civil action against defendants. That right encompassed compensatory damages and, if appropriate, punitive damages for egregious conduct. But once the compensatory claim was satisfied, the parasitic claim for punitive damages was also extinguished.[13] Adopting plaintiffs' position would require us to ignore well-established New York law and to abrogate the clear language of Congress that once a Fund claim is made, the universe of potential defendants is constricted to only terrorists responsible for the carnage and collateral-source providers.

D. Plaintiffs' Due Process Arguments

Lastly, the plaintiffs contend the district court erred in failing to conduct a factual inquiry into whether each plaintiff made a knowing and voluntary waiver of their right to bring a civil action before filing Fund claims. Plaintiffs never raised this argument below. We decline to exercise our discretion to entertain it. Unlike the interpretation of the scope of the waiver provision or the viability of claims for punitive damages under New York law, plaintiffs' argument for why the district court should have conducted a factual inquiry into the "knowing and voluntary" nature of the waiver conflicts with the positions of the parties presented to Judge Haight or Judge Hellerstein;

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[13] We note that in their briefs and at argument plaintiffs relied on *Mulder v. Donaldson, Lufkin & Jenrette*, 208 A.D.2d 301, 308 (1st Dep't 1995), for the proposition that plaintiffs may validly assert a claim for punitive damages even after waiving their right to bring a civil action for damages sustained. *Mulder*, however, addressed the issue of whether a plaintiff may seek punitive damages after receiving an award from an arbitrator premised on a determination of fault by that arbitrator. *See id.* at 308-10.

we will not entertain it. We have considered plaintiffs' remaining contentions and find them without merit for substantially the same reasons stated in the opinions issued by Judge Haight and Judge Hellerstein.

We close with a general observation. The events of September 11, 2001, changed this nation in ways that will not be fully understood for generations to come. However, the pain and sense of loss that the victims and their families feel need not wait the judgment of history—their anguish, we are sure, is a daily companion. As judges, we are not unmindful of the great sacrifice that many of New York's bravest men and women made on behalf of those who were trapped in the burning towers at Church and Vesey Streets. If Article III of the Constitution somehow gave us the power to turn back time and undo the disaster we would set to the task without reservation. Unfortunately, we have only the power to assess the law as it is given to us by Congress. Such is the nature of judging.

Conclusion

For the foregoing reasons, the district court's order entered on April 12, 2004, dismissing the complaint is hereby AFFIRMED without costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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03 CIVIL 10156(AKH)

LUCY VIGILIO, *et al.*,

Plaintiffs,

—against—

MOTOROLA AND CITY OF NY,

Defendants.

JUDGMENT

Defendants having moved to dismiss pursuant to Fed. R Civ. P. 12(b)(6), and the matter having come before the Honorable Alvin K Hellerstein, United States District Judge, and the Court, on Mar 10, 2004, having rendered its Order granting defendants' motions to dismiss and holding that the claims against the City do not fall within the definition of "collateral source obligation", it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order, dated Mar 10 2004, defendants' motions to dismiss are granted and furthermore, the claims against the City do not fall within the definition of "collateral source obligation".

Dated: New York, New York
Apr. 12, 2004

J. MICHAEL MCMAHON

Clerk of Court

By:

[ILLEGIBLE]

Deputy Clerk

This Document was
Entered on the Docket
on April 12, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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03 Civ. 10156 (AKH)

LUCY VIRGILIO, *et al.*,

—v.—

MOTOROLA AND CITY OF NEW YORK

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

The parties appeared before me on March 4, 2004 for oral argument on the defendants' motions to dismiss this case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. I reserved judgment at the time and now issue my decision.

A Rule 12(b)(6) motion requires the court to determine whether plaintiff has stated a legally sufficient claim. A motion to dismiss under Rule 12(b)(6) may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*,

355 U.S. 41, 45-46 (1957); *Branum v. Clark*, 927 F.2d 698,705 (2d Cir. 1991). In evaluating whether plaintiff could ultimately prevail, the court must take the facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 699-700 (2d Cir. 1994).

This action was brought by the personal representatives of twelve New York City firefighters who lost their lives on September 11, 2001 in the collapse of World Trade Center Towers One and Two. The amended complaint asserts numerous claims against Motorola and the City of New York for allegedly providing the firefighters with faulty radios, depriving the firefighters of adequate protection and making fraudulent misrepresentations regarding the radios. Plaintiffs bring these claims under the Air Transportation Safety and System Stabilization Act (the Act). *See* 49 U.S.C. § 40101, Pub. L. No. 107-42, 115 Stat. 230, 240 (Sept. 22, 2001), as amended by Pub. L. No. 107-71, § 201, 115 Stat. 597, 645 (Nov. 19, 2001); and *Virgilio, et al. v. Motorola and City of New York*, 2004 U.S. Dist. LEXIS 1194 (S.D.N.Y. 2004).

Congress established the VCF "to provide compensation" to victims of the September 11th attacks without facing the uncertainties of litigation. The Act § 403. To balance this extraordinary relief, Congress enacted a waiver provision: "Upon the submission of a claim [to the VCF], the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes." The Act § 405(c)(3)(B)(i). Thus, Congress provided a choice between entering the VCF or filing a lawsuit. *See Graybill v. City of New York*, 247 F. Supp. 2d 345, 349 (S.D.N.Y. 2002). I pre-

viously ruled that this choice was made upon "submission of a claim," which I held occurred on the earlier of January 22, 2004 or the date the Special Master deemed the claim substantially complete. *In re September 11 Litigation*, 2003 U.S. Dist. LEXIS 23561, *6-7 (S.D.N.Y. Dec. 19, 2003). Plaintiffs have filed claims with the Victim Compensation Fund (VCF). Of the remaining plaintiffs, five have accepted payments from the VCF,[1] two have claims in the hearing phase,[2] and four have claims that are not substantially complete.[3] Only one has dismissed her claim in this court.[4]

The defendants argue that the case should be dismissed because the plaintiffs have waived their right to sue by submitting a claim to the VCF. Plaintiffs contend that the waiver provision should not apply to their claims against Motorola and New York City because Congress intended the waiver provision to apply only to negligence claims. Plaintiffs further argue that if the waiver provision applies to these claims, the wrongful death claims against New York City are permissible under the "collateral source obligation" exception to the waiver provision. *See* the Act § 405(c)(3)(B)(i) and § 402(6) (defining collateral source obligation to include "life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to" the attacks). Plaintiff's previously raised

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[1] The five are: Lucy Virgilio, Gerard Prior, Maureen L. Dewan-Gillian, James and Barbara Boyle, and Edward Sweeney.

[2] The two are: Geraldine Halderman and Patricia DeAngelis.

[3] The four are: Eileen Tallon, Gerald Jean-Baptiste, Alexander and Maureen Santora, and Raffaella Crisci.

[4] Catherine (Sally) Regenhard, personal representative of Christian Regenhard, voluntarily dismissed her claim by Order of March 2, 2004.

identical arguments before Judge Haight, sitting in Part I, who deemed them unpersuasive. *See Virgilio, et al. v. Motorola and City of New York*, 2004 U.S. Dist. LEXIS 1194, *25-45 (S.D.N.Y. Jan. 29, 2004). I concur with Judge Haight's decision and adopt his findings as my own. Thus, I hold that the waiver provision applies to the all of the claims against Motorola and the City of New York. I further hold that the claims against the City of New York do not fall within the definition of "collateral source obligation."

As plaintiffs have elected their remedy, they have also waived the right to bring a civil action "for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001." The Act § 405(c)(3)(B)(i). I thereby grant the defendants' motions to dismiss. The Clerk of the Court shall mark this case as closed.

In parting, I note that after counsel finished their arguments at the oral argument, I allowed family members and others to address the court. Their presentations reminded the court of the tremendous sacrifice made by those who were lost that day and the ongoing difficulties the survivors face. The family members spoke of insufficient testing of the Fire Department's radios and ongoing problems with the radios. They expressed reliance on upper level officials to have rectified the problems and blamed them for having failed to do so. They highlighted that the Police Department received word, causing many to evacuate, and were able safely to leave the buildings in much greater numbers than the firefighters. In response to reports that firefighters could have evacuated but did not, one mother stated: "I'm here to . . . uphold the character and dignity of [my] son . . . [i]f he would have heard on order to evacuate, he would have evacuated . . . he loved his life. He never, never would have done anything to commit suicide." March 4, 2003 Hrg.

Tr. at 44-45. The speakers expressed tremendous guilt at accepting compensation for an uncompensable loss and deep frustration at foregoing the ability to force parties to be held accountable.

The search for resolution following a tragedy such as this is difficult and the options are imperfect. A lawsuit is rarely a good means of assigning accountability. More often a lawsuit is a conduit to distribute compensation, not a mechanism to distribute blame. Congress foresaw this difficulty by accepting a collective responsibility for those who lost their lives and providing for a speedy and generous compensation procedure where the risk, burden and expense of litigation could be avoided. The surviving family members and others associated with the victims need not feel guilt. Although their losses are irreparable, there is a collective guilt and collective responsibility for that which cannot be undone, as well as resolution that a 9/11 attack should not happen again.

So Ordered.

Dated: New York, New York
March 10, 2004

ALVIN K. HELLERSTEIN

ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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03 Civ. 10156 (AKH)

LUCY VIRGILIO, Personal Representative of Lawrence Virgilio; GERALDINE HALDERMAN, Personal Representative of Lt. David Halderman; EILEEN TALLON, Personal Representative of Sean Patrick Tallon; GERARD J. PRIOR, Personal Representative of Kevin M. Prior, CATHERINE (SALLY) REGENHARD, Personal Representative of Christian Regenhard; MAUREEN L. DEWAN-GILLIGAN, Personal Representative of Gerard P. Dewan; JAMES BOYLE and BARBARA BOYLE, Personal Representative of Michael Boyle; EDWARD J. SWEENEY, Personal Representative of Brian Sweeney; GERALD JEAN-BAPTISTE, Co-Personal Representative of Gerard Jean Baptiste, Jr.; ALEXANDER SANTORA and MAUREEN SANTORA, Personal Representatives of Christopher Santora; RAFFAELLA CRISCI, Personal Representative of John A. Crisci; and PATRICIA DEANGELIS, Personal Representative of Thomas P. DeAngelis,

Plaintiffs,

—against—

MOTOROLA, INC., and CITY OF NEW YORK,

Defendants.

MEMORANDUM AND ORDER

HAIGHT, *Senior District Judge:*

This Opinion expands upon and amplifies a ruling by this Court in the above captioned matter delivered from the bench on January 22, 2004.

I. BACKGROUND

The original complaint in this case was filed on December 22, 2003 and was subsequently assigned to the calendar of Judge Berman by lot. Time allotted to the City of New York, the only defendant named in the original complaint, to answer had not yet elapsed when local counsel for Plaintiffs addressed and personally delivered to Judge Berman, on January 13, 2003, a letter bearing that date. In that letter Plaintiffs asked Judge Berman to transfer the case to the calendar of Judge Hellerstein. Plaintiffs' letter also advised Judge Berman that the City of New York, then the only defendant, consented to the proposed transfer. Finally, Plaintiffs asked Judge Berman to schedule an "immediate hearing" on a request for relief which I describe in detail, *infra*.[1] Letter of Cheryl Shammas, Esq., dated January 13, 2004 ("January 13 letter"), at 1.

Ordinarily, under this Court's local rules, a request by counsel that a particular case be transferred from the calendar of one Judge to that of another is submitted to the proposed transferor and transferee Judges for their approval. If both Judges agree to the transfer, the Clerk is instructed to implement the transfer. If the Judges do

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[1] Plaintiffs asked Judge Berman to convene the hearing, notwithstanding their request that the case be transferred to Judge Hellerstein, because on January 13 Judge Hellerstein was out of the country.

not agree (which rarely, if ever, occurs), the requested transfer is adjudicated by the Assignment Committee of the Board of Judges.

In the case at bar, Judge Berman was unable, because he was engaged in presiding over an ongoing trial, to give immediate attention to Plaintiffs' request for transfer. As noted, Judge Hellerstein was out of the country for three weeks and was also unavailable to consider Plaintiffs' request. In these circumstances, the matter came to the attention of the undersigned, sitting in Part I.

On the evening of January 13, 2004 I met, *ex parte*, with counsel for Plaintiffs in my chambers. During that meeting I reviewed the original complaint. The claims alleged in the complaint filed on December 22, 2003 arise from and relate to the terrorist attacks on the World Trade Center on September 11, 2001. In consultation with counsel and with Judge Hellerstein's Chambers it was clear to me that Plaintiffs' causes of action were significantly related to other cases arising from and related to the terrorist attacks of September 11, 2001 that have been consolidated to the calendar of Judge Hellerstein and captioned "In re September 11 Litigation."

Given this relationship, I also considered several orders issued by Judge Hellerstein affecting these consolidated cases reported as *In re September 11 Litigation*, no. 21 MC 97, 2003 U.S. Dist. LEXIS 14411 (S.D.N.Y., July 22, 2003) (the "July 22, Order"), *In re September 11 Litigation*, no. 21 MC 97, 2003 U.S. Dist. LEXIS 21243 (S.D.N.Y., November 26, 2003) (the "November 26 Order"), and *In re September 11 Litigation*, no. 21 MC 97, 2003 U.S. Dist. LEXIS 23561 (S.D.N.Y., December 19, 2003) (the "December 19 Order"). These orders and the attendant circumstances demonstrated the need to resolve promptly Plaintiffs' request to transfer of the case. I therefore exercised my

discretion as the Part I Judge, and by an Order dated January 14, 2003 on the above captioned matter (the "January 14 Order"), directed the Clerk of the Court to transfer the case from the calendar of Judge Berman to the calendar of Judge Hellerstein.

In addition to the request to transfer, Plaintiffs, in their January 13, 2004 letter, advised Judge Berman of their "anticipated, emergency application . . . seek[ing] a hearing on the issue of [Plaintiffs'] right to proceed with this litigation while still preserving their rights under the Victim's Compensation Fund (the "Fund")." Letter of Cheryl Shammas, Esq., dated January 13, 2004, at 1 (emphasis in original). On the latter point, Plaintiffs went on in their letter to request "an immediate hearing." *Id.* at 2. In the *ex parte* meeting with counsel for Plaintiffs conducted in my Chambers on January 13, 2003, counsel reiterated this request. Again relying on the above cited Orders by Judge Hellerstein and time pressure concerns voiced by counsel then before me, I granted this request and, by my January 14 Order, scheduled a hearing for 10:30 on January 15, 2003, the time and dated recommended by counsel. January 14 Order at 2.

On January 14, 2004, lead counsel for Plaintiffs, resident in Tampa, Florida, contacted my Chambers by telephone to withdraw Plaintiffs' request for an immediate hearing. Counsel was asked to put their request in writing. Counsel obliged in the form of a letter dated January 14, 2003. Pursuant to that letter I cancelled the scheduled hearing by an Order dated January 15, 2004 (the "January 15 Order").

On January 20, 2003[4] Plaintiffs filed an amended complaint, which added Motorola, Inc. as a party defendant, together with the City of New York. As of the date this amended complaint was filed the original defendant, the City of New York, had not yet filed a responsive

pleading to the original complaint. In that circumstance, Federal Rule of Civil Procedure 15(a) allowed the Plaintiffs to amend their complaint once as a matter of course.

In the afternoon of January 21, 2003[4] Plaintiffs faxed a request for an Order to Show Cause to my Chambers for my consideration as the Judge sitting in Part 1. In their proposed Order Plaintiffs requested:

1. [An Order] [p]ermitting Plaintiffs to continue their law suits against Defendants Motorola, Inc. and the City of New York despite having filed claims with the September 11 Victim Compensation Fund.

2. In the alternative, [an Order] staying Judge Hellerstein's Orders of July 22, 2003 and December 19, 2003, which require that cases brought by September 11 victims who have Victim Compensation Fund awards pending as of January 22, 2004 be dismissed within ten days, until this matter can be considered by Judge Hellerstein on or before February 6, 2004.

3. As a further alternative, [an Order] permitting Plaintiffs to put this case on the suspense docket of the consolidated *In Re September 11 Litigation* docket (21 MC 97)(AKH), until the general consolidated conference set by Judge Hellerstein for February 6, 2004.

4. [An Order] [p]ermitting Plaintiffs to file Exhibit 2 to the Amended Complaint *in camera;* and

I signed the proposed Order on January 21, 2004 and scheduled its return for January 22, 2004 at 12:00 p.m.

At 12:00 p.m. on January 22, 2004 I heard an oral argument on the Order to Show Cause. Plaintiffs were

represented by local counsel and by lead counsel, who were admitted to practice in this Court *pro hac vice*. The City of New York was represented by the Office of the Corporation Counsel for the City of New York. Motorola was represented by retained counsel.

After receiving the aid and benefit of arguments delivered by counsel, I issued an oral ruling from the bench. The necessity for an immediate ruling on that date was precipitated by externally executed time pressure produced by dates of election established by the Victim's Compensation Fund, Title IV, 49 U.S.C. § 40101 (2002) (the "Fund"), as interpreted and enforced by and under the authority of the Fund's Special Master. One potentially critical date affecting Fund applicants was January 22, 2004, the very date of the hearing. In order to give Plaintiffs, all of whom are potential applicants to the Fund, information potentially critical for decisions that matured at the end of January 22, 2004, I issued a ruling from the bench, stating that a more detailed opinion would be filed during the following week. This is that opinion.

II. DISCUSSION

A. Jurisdiction

At the January 22, 2004 hearing, counsel for Motorola represented to the Court that Motorola had not been served with the amended complaint by which they were added as a Defendant. January 22, 2004 Transcript ("Tr.") at 29. In response to a question from the court, counsel for Plaintiff provided details of their efforts to serve Motorola. Tr. at 37. Plaintiff offered, at that time, to provide evidence of service, if necessary. Counsel for Motorola made this inquiry unnecessary by submitting

the company to personal jurisdiction. Tr. at 38. Counsel for the City of New York did not contest proper service. On this basis, I asserted jurisdiction over the parties.

Neither Defendant has made a motion to dismiss the above captioned case for lack of subject matter jurisdiction. In fact, at the oral argument conducted on January 22, 2004 counsel for the City of New York acknowledged that the Court does have jurisdiction over Plaintiffs' claims against the City. Nevertheless, this Court is under a independent obligation to consider the existence *rel non* of subject matter jurisdiction. *See Capron v. Van Noorden*, 6 U.S. 126, 127 (1804) ("it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it."); *Wynn v. AC Rochester*, 273 F.3d 153, 157 (2d Cir., 2001) ("Parties cannot confer subject matter jurisdiction where the Constitution and Congress have not. The absence of such jurisdiction is non-waivable; before deciding any case we are required to assure ourselves that the case is properly within our subject matter jurisdiction.").

To discharge this duty, the Court posed questions to counsel for Plaintiffs at the January 22, 2004 hearing relating to an apparent problem with the assertion of subject matter jurisdiction made in their complaint. In the first paragraph of the original complaint in this matter, filed December 22, 2004[3], in paragraphs 3(h) through 3(n) of the Affirmation in Support of the Order to Show Cause, signed by Cheryl L. Shammas, Esq., and filed by Plaintiffs in support of their proposed Order to Show Cause ("Affirmation"), and again in oral argument on January 22, 2003[4] (Tr. at 9,10) Plaintiffs characterize their claims against the City of New York as a civil action to recover collateral source obligations. Specifically, Plaintiffs assert that, in their Amended Complaint, Count One, relying on New York Labor Law

§ 27-a, and Counts One, Two, and Three relying on New York General Municipal Law § 205-a, seek to recover collateral source obligations owed by the City to New York City firefighters. *See* Amended Complaint at 10-13; Affirmation at 6,7.

By bringing an action to recover a collateral source obligation, Plaintiffs have compromised their claim on the jurisdiction of this Court. In paragraph seven of their Amended Complaint Plaintiffs state that "[t]he jurisdiction of this Court is invoked pursuant to Section 408(b)(3) of Public Law 107-42 (Air Transportation and System Stabilization Act)" (hereafter referred to as the "ATSSSA"). The section to which Plaintiffs refer reads:

> The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

While Plaintiffs' claims surely do result from and relate to the terrorist attacks of September 11, 2001, the apparently expansive grant of exclusive jurisdiction is not without limits. Specifically, Section § 408(c) provides that "[s]ubsections (a) and (b) do not apply to civil actions to recover collateral source obligations." Therefore, the exclusive grant of jurisdiction to the federal courts found in § 408(b)(3) does not apply to actions to enforce collateral source obligations, such as that brought by Plaintiffs against the City of New York. It follows, that, barring an alternative source of federal subject matter jurisdiction, the Court must dismiss Plaintiffs' claims seeking recovery of collateral source obligations. *See Associated Aviation Underwriters v. Arab*

Ins. Group, No. 02 Civ. 4983, 2003 U.S. Dist. LEXIS 6254 (S.D.N.Y., April 16, 2003) (finding that suits to recover monies owed on reinsurance policies but related to events on September 11, 2001 are actions to recover collateral source obligations and declining to take jurisdiction on that basis); *Canada Life Assurance Co. v. Converium Ruckversicherung,* 210 F.Supp. 2d., 322 (S.D.N.Y., 2002) (declining to assert jurisdiction over September 11, 2001 related action to recover collateral source obligations).

Counsel for the City of New York suggested a potential solution to this jurisdictional problem, arguing that Plaintiffs' claims were not, in fact, actions to "recover collateral source obligations" within the meaning of the statute. Tr. at 26. *See e.g.* ATSSSA §§ 402(6), 405(c)(3)(B)(i), and 408(c).

The City has an obvious interest in making this argument, given the potential impact of the waiver provision in the ATSSSA, § 405(c)(3)(B)(i), which reads in its entirety:

> Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations, or to a civil action against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

While Plaintiffs concede that the waiver provision would apply to suits against the City as a general matter, they contend that it does not apply to their claims in particular because theirs is a "civil action to recover collateral

source obligations." If I were to accept the City's view that Plaintiffs' claims are not "civil actions to recover collateral source obligations," then the City would have an affirmative defense of immunity derived from Plaintiffs' waiver of their right to pursue a civil action secondary to their submission of claims to the Victim's Compensation Fund.

However, the City's professed acceptance of subject matter jurisdiction cannot create that jurisdiction. *See Capron* and *Wynn, supra*. Further, while for reasons stated *infra* I am not persuaded that Plaintiffs' civil action is one to recover collateral source obligations within the meaning of § 405(c)(3)(B)(i), for the purposes of evaluating subject matter jurisdiction I must consider Plaintiffs' allegations under the "well pleaded complaint" rule propagated by the Supreme Court and the Second Circuit.[2] Within these confines I can look no farther than the complaint as Plaintiffs cast it when deter-

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[2] The well pleaded complaint rule has been propagated in cases where subject matter jurisdiction is sought as a function of some federal question presented by a pleading. In the normal case of federal question jurisdiction a federal law animates the claims found in a pleading in some fashion or another. Here that federal law granting jurisdiction to this Court will, after having achieved this initial purpose, give way to state law on cases of liability and damages. Just as a federal court sitting in diversity is usually faced with claims determined by state law, most claims, the present ones included, that assert causes of action arising from or relating to the terrorist attacks on September 11, 2001 will be determined by state law. It seems to this Court, however, that this circumstance does not affect the application of the well pleaded complaint rule in this case. Assuming that the statutory grant of jurisdiction found in § 408(b)(3) is constitutional, any cases brought under its umbrella will have, paraphrasing Article III, Section 2 of the United States Constitution, arisen under the laws of the United States. The fact that, once risen, the case will not rely on federal law for guidance as to substantive merits issues is of, at the most, academic interest.

mining whether or not the case, as pleaded, falls under the subject matter jurisdiction of this Court.[3] *See e.g, Louisville and Nashville Railroad v. Mottley*, 211 U.S. 149, 152-153 (1908); *Taylor v. Anderson*, 234 U.S. 74 (1914); *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987); *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989); *Perpetual Securities, Inc. v. Tang*, 290 F.3d 132,136-140 (2nd Cir. 2002). If a court determines that a case presented to it on the basis of its original jurisdiction is not within "the original jurisdiction of the United States district courts" then it must dismiss or remand the case. *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 (1983).

The well pleaded complaint rule is, in this context, a term of art. It speaks not to a presumption of proper form or of merit but to a presumption that a plaintiff is "master of the claim." *Caterpillar* at 392. Under this presumption, for a federal court to assert jurisdiction over a claim "it must appear, at the outset, from the declaration of the bill of the party suing, that the suit is of [a federal] character." *Tennessee v. Union & Planters Bank*, 152 U.S. 454, 464. The original complaint filed in the above captioned matter characterized Plaintiffs' claims against the City as "an action to recover a statutory collateral source obligation." At the January 22 oral argument and in their Affirmation, Plaintiffs make it clear that their claims against the City are of this char-

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[3] I note now, as I did at the January 22, 2004 hearing, that if I am mistaken in my application of the well pleaded complaint rule in the present analysis then my later finding that Plaintiffs' claims against the City do not form an action to recover collateral source obligations would make § 408(c) inapplicable in this case, allowing the Court to take jurisdiction over Plaintiffs' claims against the City under § 408(b)(3).

acter. Under the well pleaded complaint rule the Court appears bound to accept Plaintiffs' characterization of their own claims. So doing puts Plaintiffs' claims against the City outside the exclusive grant of jurisdiction found in 408(b)(3). Without another source of jurisdiction, the Court would seem bound to dismiss Plaintiffs claims against the City.

The City's contention that Plaintiffs do not accurately characterize their own claims does not remedy the jurisdictional problem created by Plaintiffs' complaint. The City's proposal would require the Court to consider the merits of a potential defense of immunity that the City will, most assuredly, raise as an affirmative defense against Plaintiffs' claims. Under the well pleaded complaint rule, however, a "plaintiff's claim itself must present a federal question 'unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.' " *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667, 672 (1950) (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)). The Court may not, then, consider the City's criticism of Plaintiffs' characterization of their own claims in order to remedy a pleading that is deficient as to subject matter jurisdiction.

The situation here is importantly distinguishable from the more familiar case where initial pleadings make sufficient claims of subject matter jurisdiction. In those circumstances a court may, and should, test representations and characterizations drafted into the complaint in order to assure itself that a plaintiff has not, through artful but hollow pleading, brought before a federal court a claim that is not, in fact, within the proper jurisdiction of the federal courts. Similarly, a federal court may dismiss a claim that is "patently without merit," thereby destroy-

ing jurisdiction. *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 70 (1978).

The well pleaded complaint rule dictates, however, that a court may not inquire and act in the opposite direction, examining and dismissing potentially meritless claims in order to gain jurisdiction. This may seem odd, but the limitation imposed by the well pleaded complaint rule and the presumption that a plaintiff is master of his or her complaint has as much to do with institutional logic as it does legal principle. If a complaint, on its face, establishes a claim for federal jurisdiction, then it will achieve the preliminary goal of putting the claim before a federal court. The court can then proceed to investigate the merits of the claim and, if the court finds some claims wanting, take appropriate action. If, in this preliminary review of the merits, a court takes action that destroys jurisdiction established by the complaint, then it is obliged to dismiss or remand the case. Alternatively, if a complaint, on its face, fails to establish a basis for subject matter jurisdiction, then the merits therein can never be considered by the court. Any inquiry or action would be without authority,

While the normal case in which this specter raises its head finds a defendant trying to create federal jurisdiction where a plaintiff has, through artful pleading, avoided federal jurisdiction by making state law claims only, this Court can see no way, in principle or law, to distinguish this case. The well pleaded complaint rule creates a presumption that plaintiffs, as masters of their complaints, have chosen to characterize their claims as they have for reasons that they alone have the initial authority to weigh. Given this presumption, a court may not add or subtract from a complaint presented to it for the purposes of gaining jurisdiction that is not created by the complaint itself. Similarly, a Court may not anticipate

potential defenses to create jurisdiction for itself, no matter how certain it is that these defenses will be raised. Here, Plaintiffs may not have fully appreciated the limits imposed by § 408(c) on the § 408(b)(c) grant of subject matter jurisdiction. They have, as a result, filed a pleading that artfully, though perhaps unintentionally, avoids the jurisdiction of this Court. I may not remedy the situation by making a preliminary ruling on the merits of the City's anticipated immunity defense, despite the City's urging to the contrary.

Even under the well pleaded complaint rule, it might be argued that Plaintiffs' characterization of their claims as efforts to recover collateral source obligations are, themselves, efforts made in "anticipation of avoidance of" an immunity defense that Plaintiffs foresee that the City might affirmatively raise. While this may be an accurate characterization of Plaintiffs' motives, it fails to appreciate the guidance provided by cases applying the well pleaded complaint rule cited above. Specifically, it misses the distinction between investigating representations made in a complaint in order to defeat jurisdiction and investigations embarked upon in order to create jurisdiction. To test Plaintiffs' characterization of their claims against the City as actions seeking to recover collateral source obligations would be to do the latter, an activity that is forbidden by law and logic. Moreover, the Court is not convinced that Plaintiffs' choice to characterize their claims as they have is without substantial legal effect. As pleaded, Plaintiffs' decision to cast their claims against the City as an action to recover a statutory collateral source obligation owed by the City of New York to New York City firefighters will do more than decorate Plaintiffs' claim or provide security against a potential defense. Their choice will likely affect duties of proof and provide Plaintiffs with legal

opportunities that they might not otherwise have. Even were I empowered to, then, I would be loathe to find their claims "patently without merit" for the purposes of determining jurisdiction."

By the foregoing analysis, the Court seems obliged to dismiss Plaintiffs' claims against the City of New York pursuant to § 408(c). Plaintiffs do not, however, characterize their claims against Motorola as part of a civil action to recover collateral source obligations. Therefore, Plaintiffs properly avail themselves of the jurisdictional grant in § 408(b)(3) with respect to their claims against Motorola.

At the January 22, 2004 hearing, counsel for Plaintiffs, after noting the Court's jurisdiction over claims against Motorola, argued that the claims against the City and the claims against Motorola are interrelated. Tr. at 19. Based upon this contention, counsel argued that Plaintiffs' cause of action should not be bifurcated. *Id.* Later on, counsel for Plaintiffs pointed out that "the amended complaint refers to actions that are concerted in nature," Tr. at 34. Counsel argued that these claims against both Defendants jointly were not brought to recover a collateral source obligation. *Id.* Counsel concluded that these joint claims provided additional reason not to parse off their claims against the City. *Id.*

I find these arguments persuasive. While Plaintiffs' claim of concert between Defendants comes only at the end of the complaint, it enjoys at least a narrative dominance in Plaintiffs' cause of action. It establishes a context for evaluating and appreciating Plaintiffs' claims against the City and Motorola individually. Beyond this, there are obvious overlaps in Plaintiffs' probable burdens of proof on their various claims. Specifically, Plaintiffs' claims against both Defendants will likely require that Plaintiffs establish certain alleged deficits in the

design and function of Motorola XTS 3500 radios, as well as the circumstances under which these radios allegedly came to be used by firefighters present in at the World Trade Center on September 11, 2001 and the alleged shortcomings of the devices that Plaintiffs say were made apparent to all who were paying attention by earlier incidents. These are but a few areas of significant interrelation that demonstrate that Plaintiffs' claims against the City seeking recovery of collateral source obligations are so closely related to their claims against Motorola individually and the Defendants jointly that they form part of the same case and controversy. Since, pursuant to § 408(b)(3); this Court has original and exclusive jurisdiction over claims against Motorola individually and against the Defendants jointly, the Court will, relying upon under 28 U.S.C. § 1367, assert supplemental jurisdiction over the claims against the City of New York that Plaintiffs characterize as a civil action to recover collateral source obligations.

B. The First Form of Requested Relief

Plaintiffs' first form of requested relief is for "[an Order] [p]ermitting Plaintiffs to continue their law suits against Defendants Motorola, Inc. and the City of New York despite having filed claims with the September 11 Victim Compensation Fund." Order to Show Cause at 2. While it is not entirely clear from the text of their proposed Order to Show Cause what Plaintiffs hope the Court will do by way of this request, the accompanying Affidavit in Support of the Order to Show Cause provides useful clarification. There it is argued that plaintiffs should be allowed to pursue both their claims with the Fund and this lawsuit because the waiver provision of the September 11th Victim Compensation Fund of 2001, § 405(c)(3)(B)(i), does not apply to Plaintiffs'

claims against the Defendants in this case. At the January 22, 2004 hearing I expressed the view that "the plaintiffs' claims against both the City and Motorola are subject to the limitation on civil actions provided for in Section 405(c)(3)(B)(i) of the statute." Tr. at 43. To reach this conclusion it was necessary to address the merits of Plaintiffs' contention that the waiver provision does not apply to their claims against the City, Motorola, and both Defendants jointly. I now provide more extensive explanation of the rationale underlying my January 22, 2004 conclusion.

1. The Waiver Provision Applies to Plaintiffs' Case Against Motorola

It is worth repeating, in this context, the language of § 405(c)(3)(B)(i) of the ATSSSA, which reads:

> Upon the submission of a claim under this title the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations, or to a civil action against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

It is undisputed that Plaintiffs' action against Motorola is not one to recover collateral source obligations. Therefore, an initial reading of the statute would suggest that this waiver provision forbids Plaintiffs from obtaining what their Order to Show Cause seeks, namely, the privilege to pursue litigation against Motorola in civil court while concurrently filing a claim under the Fund.

In Plaintiffs' Affirmation In Support of their proposed Order to Show Cause, they suggest two reasons why this may not be so. First, they argue that the purpose of the ATSSSA was to "prevent the destruction of the nation's commercial aviation industry," and consequently that the waiver of civil action in § 405(c)(3)(B)(i) must be interpreted in light of this primary purpose. Affirmation at 5-6. Second, Plaintiffs note that in the ATSSSA and in subsequent amendments, Congress chose to limit the liability of specific defendants, namely air carriers, airline related entities (such as aircraft manufacturers and airport sponsors), and the City of New York. These limitations on liability are promulgated in Section 408(a) of the Act.

According to Plaintiffs, the limitations on liability set forth in § 408(a) demonstrate that Congress interpreted the facially broad language of § 405(c)(3)(B)(i) to, in fact, be limited to precluding suits only against entities whose liability Congress had chosen to limit. That is to say, Plaintiffs argument is that the general waiver found in § 405 only applies when a party chooses to file suit against a defendant whose liability is limited by § 408. Because § 408 does not limit the liability of Motorola specifically, Plaintiffs argue that they should be entitled to pursue litigation against Motorola while also filing actions under the Victims Compensation Fund.

Plaintiffs' argument relies upon a necessary and erroneous inference. The inference that must be true for Plaintiffs to succeed is that Congress chose to limit the liability of certain specific defendants in § 408 because those were the only defendants against whom Congress meant § 405 to apply. This conflated interpretation of §§ 405 and 408 is not valid based on a reading of the plain language of the statute.

In point of fact, the ATSSSA serves at least two distinct purposes. One of them is to provide some protection for potential *defendants* who might find themselves driven to bankruptcy by lawsuits brought against them that arise from and relate to the tragic events of September 11, 2001. Another purpose is to provide potential *plaintiffs* with an alternative to litigation, allowing an opportunity to obtain compensation for their losses without running the inherent risks and bearing the inevitable costs associated with litigation. While the strategies adopted by the Act to pursue the these two purposes are mutually supporting (providing an alternative to litigation does provide some protection for potential defendants and limitations on liability insert additional risks of litigation that make an alternative more attractive or necessary), the purposes themselves are entirely separable. Limiting liability would have, of itself, provided ample protection for potentially vulnerable defendants. Likewise, the Victim's Compensation Fund would have, standing alone, provided an alternative to litigation.

The structure of the Act itself reflects these separable purposes. § 405 governs the eligibility requirements for obtaining compensation from the Fund. As specified by the waiver provision, one of these requirements is to waive the right to file a civil action in any federal or state court for damages sustained as a result of the September 11 terrorist attacks. If, upon a careful evaluation of her options under § 405, a potential plaintiff decides that her most prudent course of action would be to forgo a claim on the Fund and instead continue with litigation, then the inquiry moves on to § 408. Under this section, all parties are given fair warning that judgments against certain individual defendants, if obtained and if

necessary, will be reduced to the limits of these defendants' liability insurance coverage.[4]

§ 408, then, governs limitations on liability that, by practice and logic, are only worth noting once a potential plaintiff has elected not to pursue the alternative to litigation addressed by, *inter alia*, § 405. It is not necessary to speculate on the reasons Congress had for limiting the liability of the particular entities identified in § 408. What is clear is that Plaintiffs have failed to demonstrate that Congress's only, or primary, reason for doing so was to determine who can benefit from the waiver provision in § 405. They cannot make such a demonstration because it is simply not the case.

In their Affirmation in Support of the Order to Show Cause, Plaintiffs properly note that when the language of a statute is ambiguous, the Court must focus on the "broader context" and "primary purpose" of the statute. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 344 (1997); *Castellano v. City of New York*, 142 F.3d 58, 67 (2d Cir. 1998). Plaintiffs contend that the waiver language in § 405 of the ATSSSA is ambiguous and, therefore, must be interpreted in light of what Plaintiffs allege is the Act's primary purpose: to protect the commercial aviation industry. To support the claim that this is the primary purpose of the ATSSSA, plaintiffs reference comments made by members of Congress in the course of drafting the ATSSSA. Notably, Plaintiffs reference statements by Congressman Dan Young of Alaska, who stated during floor debate that the ATSSSA was designed "to address the threat to the continued stability and viability of our U.S. air transportation system," and "to ensure the continued operation of our air transportation

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[4] "Judgments against the City of New York shall not exceed the greater of the city's insurance coverage or $350,000,000," ATSSSA § 408(a)(3).

system." 147 Cong. Rec. H 5894 (Sept. 21, 2001). Plaintiffs also reference a statement made by Senator Kay Bailey Hutchinson of Texas, who noted that the Act was an "effort of the U.S. Congress, working with the President, to shore up the aviation industry in our country." 147 Cong. Rex. S 9589-01 (Sept. 21, 2001). From this evidence, Plaintiffs conclude that the waiver provision cannot be read to preclude Plaintiffs' dual action in applying for Fund relief and also pursuing litigation against Motorola, who is, admittedly, not primarily in the commercial aviation industry.

This argument fails for two reasons. First, the language of the statute is not ambiguous. The language of § 405 clearly requires the waiver of civil actions against any defendant, even those whose liability is not limited by § 408.[5] Second, even if the language was ambiguous, it is not, as stated *supra*, the case that the only purpose of the ATSSSA was or is to protect the aviation industry. Congressional remarks make clear that the ATSSSA also serves the goal of providing expeditious compensation to victims as an alternative to tort actions. See 147 Cong. Rec. S. 9594 (Sept. 21, 2001) (remarks of Sen. McCain) ("These victims and their families may, but are not required to, seek compensation from the Federal fund instead of through the litigation system."); id., at S 9595 (remarks of Sen. Hatch) (The VCF "will help ensure that injured people receive money and receive it faster than they otherwise would if left to pursue claims through litigation."); id., at S 9599 (remarks of Sen. Leahy) ("Filing a claim under the program will preclude other civil remedies."); 147 Cong. Rec. H 5914 (Sept. 21, 2001)

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[5] Excepting, of course, "civil action[s] to recover collateral source obligations" and actions "against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act." ATSSSA § 408(c)(3)(B)(i).

(remarks of Rep. Conyers) ("individuals may elect to pursue compensation from the VCF or a damages action under the ATSSSA").

For the foregoing reasons, Plaintiffs request to continue their lawsuit against Motorola while concurrently pursuing a claim under the Victim's Compensation Fund is denied.

2. The Waiver Provision Applies to Plaintiffs' Case Against the City of New York

Earlier in this Opinion, in the context of evaluating the authority of this Court to entertain any issues of substance in this case, I declined to consider the merits of Plaintiffs' assertion that their claims against the City should not be subject to the waiver provision of § 408(c)(3)(B)(i). Having asserted jurisdiction over all claims in the present action, I now must entertain questions that I could not then in order to evaluate Plaintiffs' first requested form of relief as it would apply to Plaintiffs' claims against the City.

Although it is repetitious, I will quote again the waiver provision of the ATSSSA, § 408(c)(3)(B)(i), which reads, in its entirety:

> Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations, or to a civil action against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

Based upon the statute itself and regulations promulgated by the Special Master, Judge Hellerstein has previously determined, in the context of the consolidated docket pending before him, that, under the waiver provision, a claimant "will have waived his right to sue, or to maintain his suit when that filing, or submission, [with the Victim's Compensation Fund] is substantially complete as determined by the Special Master's Claims Evaluator or January 22, 2004, whichever is earlier, and not before then." December 19 decision at *9. In their Order to Show Cause and again at the January 22, 2004 hearing Plaintiffs voiced an immediate, time-sensitive concern that claims they may have filed or intended to file with the Fund would provide the City and Motorola with affirmative defenses of immunity by way of § 405(c)(3)(B)(i). Plaintiffs sought to remedy this concern in their first proposed form of relief.

In the first paragraph of the original complaint in this matter, filed December 22, 2003, in paragraphs 3(h) through 3(n) of the Affirmation in Support of the Order to Show Cause, signed by Cheryl L. Shammas, Esq., and filed by Plaintiffs in support of their proposed Order to Show Cause ("Affirmation"), and again in oral argument on January 22, 2003[4] (Tr. at 9, 10) Plaintiffs argue that any claims they might submit or have submitted to the Fund should not require them to waive their right to pursue their claims against the City because they form a "civil action to recover collateral source obligations" analogous to a civil action to recover a life insurance policy. Specifically, Plaintiffs assert that, in their amended Complaint, Count One, relying on New York Labor Law § 27-a, and Counts One, Two, and Three relying on New York General Municipal Law § 205-a, seek to recover collateral source obligations owed by the City to firefighters. *See* Amended Complaint at 10-13; Affir-

mation at 6, 7. If Plaintiffs are correct in their characterization of these claims then they are entitled to the first form of relief proposed in the Order to Show Cause. If they are not correct then they are not so entitled. Because I find that Plaintiffs' claims against the City do not fit the definition of "civil action to recover collateral source obligations" within the meaning of these words in the ATSSSA[5] I hold that Plaintiffs' claims against the City are subject to the waiver provision in § 405(c)(3)(B)(i). It follows that I must decline to grant Plaintiffs' first form of proposed relief with respect to their claims against the City.

In the ATSSSA Congress defines collateral source as "all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001." ATSSSA § 402(6). Plaintiffs assert that their tort claims against the City fall within this definition because New York Municipal Law § 205-a obliges the City to compensate Plaintiffs for any negligent or wrongful actions by the City or its agents that resulted in injury and death of New York City firefighters on September 11, 2001. Affirmation at 7, 8. Plaintiffs further contend that any payments made by the City as a result of a judgment

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[5] I emphasize here, as I did on January 22, 2004, that my holding on this point is limited to the present case, the present facts, and the present context, principally jurisdictional, in which I am also asked by Plaintiffs to take preliminary declaratory action. I hold as I do only for the purposes of answering the immediate and time-sensitive questions put to me as the Judge sitting in Part I. I do not intend that my holding on this point should become the law of the case for all contexts in which this or similar issues may arise. I certainly do not intend this holding to affect the remaining cases on Judge Hellerstein's consolidated docket or other litigation arising from or related to the terrorist attacks on September 11, 2001.

entered in Plaintiffs' favor on the present tort action would be "payments" by a "local government[ ] related to the terrorist-related aircraft crashes of September 11, 2001." ATSSSA § 402(6). *Id.* In further support of their position, Plaintiffs analogize between the present tort claim and a claim on a life insurance policy, the latter being specifically named in the definition of "collateral source" provided in ATSSSA § 402(6). Affirmation at 7, 8.

Congress defined "collateral source" in the ATSSSA, § 402(6), as "all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001." That definition does not include tort claims, such as the one at bar, that allege and seek to prove wrongful action that results in injury or death. The familiar interpretive principle *of ejudsem generis* dictates that "where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Black's Law lictionary, 5th edition, page 464 (citations omitted). Taking note of the statutory definition of "collateral source" in § 402(6), it is clear that Congress meant for all "payments by Federal, State, or local governments" to be of a kind with "life insurance, pension funds, [and] death benefit programs."

As counsel for the City acknowledged, a case brought by a firefighter or his heir in pursuit of a contractual right to an annuity benefit would be of a kind with the examples listed in § 402(6). Tr. at 27, 28. A tort claim seeking to establish wrongdoing in order to win a judgment is not, however, of a kind with actions in pursuit of

entitlements under insurance polices and death benefit programs.

The key distinction that Plaintiffs miss in their argument and in their analogy is between an action designed to enforce an entitlement and one designed to establish an entitlement. As its title suggests, New York General Municipal Law § 205-a creates an "[a]dditional right of action to certain injured or representatives of certain deceased firefighters." To the extent that the law creates an entitlement, it is an entitlement to sue parties whose "neglect, omission, willful or culpable negligence," NY Gen. Mun. Law § 205-a(1), results in the injury or death of a firefighter. The law protects firefighters from some common law defenses, but it still requires a proof of negligence or other culpable wrongdoing. *See O'Connell v. Kavanagh*, 231 A.D.2d 29 (N.Y.A.D. 1st, 1997); *Kenvan v. City of New York*, 70 N.Y.2d 558 (N.Y.C.A., 1987).

In contrast to tort cases such as these, which require proof in order to create a judgment, actions to recover collateral source obligations are actions to *recover* an entitlement previously created by statute or by contract. These actions do not *create* the entitlement. Plaintiffs right to sue under New York law does not create an entitlement to receive funds or a complementing obligation to pay. Plaintiffs may, if successful on their lawsuit, be entitled to compensation on a favorable judgment. Under the waiver provisions of the ATSSSA, however, they will have forgone any claim on the Fund by pursuing their tort suit.

Prior decisions by federal courts that have considered the extent and meaning of "collateral source" in the context of the ATSSSA also indicate that Plaintiffs' tort claim is not an action to recover collateral source obligations. Where courts have regarded legal claims arising

from and related to the September 11, 2001 terrorist attacks as actions to recover collateral source obligations, the benefit sought has been a pre-existing entitlement of a kind with those enumerated in the ATSSSA. *See e.g. Canada Life Assurance Co. v. Converium Rückversicherung*, 335 F.3d 51, 56-58 (2nd Cir., 2003) (discussing "collateral source obligations" as rights of contract formed by existing insurance indemnification policies); *Associated Aviation Underwriters v. Arab Ins. Group*, No. 02 Civ. 4983, 2003 U.S. Dist. LEXIS 6254 (S.D.N.Y., April 16, 2003) (suits to recover monies owed on reinsurance policies are actions to recover collateral source obligations); *Hickey v. City of New York (in re World Trade Ctr. Disaster Site Litig.)*, 270 F. Supp. 2d 357, 362 (S.D.N.Y., 2003) ("collateral source obligations" (for example, insurance or other such items which, under the Act, are to be deducted from claims against the Victim Compensation Fund)"). Plaintiffs' present action is unlike any of these actions. It is a tort action that seeks a judgment based on wrongdoing.

Finally, Plaintiffs argue that any recovery they might receive from their suit against the City would offset awards from the Fund, thereby proving that their action is one to recover collateral source obligations. *Id.* at 8. This "proof" indulges in the common logical fallacy of question begging, however. Plaintiffs assume that which they seek to prove, namely that theirs is a civil action to recover collateral source obligations. If it is, then recovery on the suit would offset a Fund award. If, however, it is not, then no offset will occur because Plaintiffs will have had to choose between their civil action and a claim on the Fund. Thus, there would be no Fund claim to offset.

For the foregoing reasons I am of the view that within the confines of the present motion Plaintiffs' action against

the City is not one to recover collateral source obligations within the meaning of ATSSSA § 405(c)(3)(B)(i). Therefore, the waiver provision applies to Plaintiffs' claims against the City of New York. On this basis I decline to grant Plaintiffs' first proposed form of relief with respect to their claims against the City.

3. The Waiver Provision Applies to Plaintiff's Case Against the Defendants Jointly

Plaintiffs have not argued, in their papers or at the January 22, 2004 hearing, that their claims against the Defendants jointly should qualify for any particular exception to the waiver provision at § 408(c)(3)(B)(i). Given my conclusion that the waiver provision applies to Plaintiffs' claims against each of the Defendants individually, there is no reason why it should not also apply to claims against the Defendants jointly. I therefore conclude that the waiver provision applies to Plaintiffs claims against the Defendants jointly. Consistent with this holding, I must decline to grant Plaintiffs' first proposed form of relief with respect to their claims against the Defendants jointly.

C. The Second Form of Requested Relief

In an alternative to their first proposed form of relief, Plaintiffs ask this Court to stay "Judge Hellerstein's Orders of July 22, 2003 and December 19, 2003, which require that cases brought by September 11 victims who have Victim Compensation Fund awards pending as of January 22, 2004 be dismissed within ten days, until the matter can be considered by Judge Hellerstein on or before February 6, 2004." By contrast to Plaintiffs' first proposed form of relief, this proposal does not raise any concerns time pressure. Assuming that the situation is as

Plaintiffs portray it in their request,[6] under Federal Rule of Civil Procedure 6(a) the earliest date upon which Plaintiffs' fears might be realized is February 5, 2004. The concerns presented in Plaintiffs' second form of requested relief are, thus, not immediate. Given this, the Court sees no reason to take immediate action on Plaintiffs' second request for relief and declines to do so.

D. The Third Form of Requested Relief

Plaintiffs propose, as a further alternative, that the Court place their case on the suspense docket created by Judge Hellerstein for some cases related to the September 11, 2001 terrorist attacks. By my oral Order on January 22, 2004 and by a separate written Order dated January 22, 2004 I granted this request "provisionally and in principle." In the written Order I further ordered, consistent with the oral Order, that "the above captioned cause of action will be moved to the suspense docket maintained by Judge Hellerstein when Plaintiffs, have met the procedural requirements for such an application set forth by Judge Hellerstein in his July 22, 2003 Order reported at *In re September 11 Litigation*, no. 21 MC 97, 2003 U.S. Dist. LEXLS 14411 (S.D.N.Y., July 22, 2003)." January 22, 2004 Order at 2. My written Order of January 22, 2004 did not disturb my oral Order of January

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[6] The Court does not, in any way, mean to endorse this assumption. It seems clear that, at the very least, the dismissal that Plaintiffs fear is not automatic. It will require an affirmative action on the part of Judge Hellerstein. Assuming, then, that Judge Hellerstein's July 22, 2003 Order applies to active cases such as the one presently at bar (another assumption this Court does not mean to endorse), Plaintiffs will have ample opportunity to ask Judge Hellerstein himself to stay his own hand. This Court has neither the inclination nor the authority to stay it for him.

22, 2004 and the present Order does not disturb, in any way, my written Order of January 22, 2004.

E. The Fourth Form of Requested Relief

At the January 22, 2004 hearing the parties agreed to hold in abeyance the motion to file Plaintiffs' Exhibit 2 *in camera*. Consistent with this agreement I decline to grant Plaintiffs' fourth proposed form of relief without commenting on the merits or demerits of their request.

III. CONCLUSION

For the foregoing reasons the first, second, and fourth proposed forms of relief set forth in the January 21, 2004 Order to Show Cause issued by this Court are denied. The third form of proposed relief is granted consistent with this Court's January 22, 2004 Order in the above captioned case.

It is SO ORDERED.

Dated: New York, New York
January 29, 2004

CHARLES S. HAIGHT, JR.

CHARLES S. HAIGHT, JR.
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES PUBLIC LAWS
107th Congress – First Session
Convening January, 2001

PL 107-42 (HR2926)
September 22, 2001
AIR TRANSPORTATION SAFETY
AND SYSTEM STABILIZATION ACT

An Act To preserve the continued viability of the United States air transportation system.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Air Transportation Safety and System Stabilization Act".

TITLE I—AIRLINE STABILIZATION

SEC. 101. AVIATION DISASTER RELIEF.

(a) IN GENERAL.—Notwithstanding any other provision of law, the President shall take the following actions to compensate air carriers for losses incurred by the air carriers as a result of the terrorist attacks on the United States that occurred on September 11, 2001:

(1) Subject to such terms and conditions as the President deems necessary, issue Federal credit instruments to air carriers that do not, in the aggregate, exceed $10,000,000,000 and provide the subsidy amounts necessary for such instruments in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).

(2) Compensate air carriers in an aggregate amount equal to $5,000,000,000 for—

(A) direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order issued by the Secretary of Transportation or any subsequent order which continues or renews such a stoppage; and

(B) the incremental losses incurred beginning September 11, 2001, and ending December 31, 2001, by air carriers as a direct result of such attacks.

(b) EMERGENCY DESIGNATION.—Congress designates the amount of new budget authority and outlays in all fiscal years resulting from this title as an emergency requirement pursuant to section 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 901(e)). Such amount shall be available only to the extent that a request, that includes designation of such amount as an emergency requirement as defined in such Act, is transmitted by the President to Congress.

SEC. 102. AIR TRANSPORTATION STABILIZATION BOARD.

(a) DEFINITIONS.—In this section, the following definitions apply:

(1) BOARD.—The term "Board" means the Air Transportation Stabilization Board established under subsection (b).

(2) FINANCIAL OBLIGATION.—The term "financial obligation" means any note, bond, debenture, or other debt obligation issued by an obligor in con-

nection with financing under this section and section 101(a)(1).

(3) LENDER.—The term "lender" means any non-Federal qualified institutional buyer (as defined by section 230.144A(a) of title 17, Code of Federal Regulations (or any successor regulation) known as Rule 144A(a) of the Securities and Exchange Commission and issued under the Security Act of 1933, including—

(A) a qualified retirement plan (as defined in section 4974(c) of the Internal Revenue Code of 1986 (26 U.S.C. 4974(c)) that is a qualified institutional buyer; and

(B) a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986 (26 U.S.C. 414(d)) that is a qualified institutional buyer.

(4) OBLIGOR.—The term "obligor" means a party primarily liable for payment of the principal of or interest on a Federal credit instrument, which party may be a corporation, partner ship, joint venture, trust, or governmental entity, agency, or instrumentality.

(b) AIR TRANSPORTATION STABILIZATION BOARD.—

(1) ESTABLISHMENT.—There is established a board (to be known as the "Air Transportation Stabilization Board") to review and decide on applications for Federal credit instruments under section 101(a)(1).

(2) COMPOSITION.—The Board shall consist of—

(A) the Secretary of Transportation or the designee of the Secretary;

(B) the Chairman of the Board of Governors of the Federal Reserve System, or the designee of the Chairman, who shall be the Chair of the Board;

(C) the Secretary of the Treasury or the designee of the Secretary; and

(D) the Comptroller General of the United States, or the designee of the Comptroller General, as a nonvoting member of the Board.

(c) FEDERAL CREDIT INSTRUMENTS.—

(1) IN GENERAL.—The Board may enter into agreements with 1 or more obligors to issue Federal credit instruments under section 101(a)(1) if the Board determines, in its discretion, that—

(A) the obligor is an air carrier for which credit is not reasonably available at the time of the transaction;

(B) the intended obligation by the obligor is prudently incurred: and

(C) such agreement is a necessary part of maintaining a safe, efficient, and viable commercial aviation system in the United States.

(2) TERMS AND LIMITATIONS.—

(A) FORMS; TERMS AND CONDITIONS.—A Federal credit instrument shall be issued under section 101(a)(1) in such form and on such terms and conditions and contain such covenants, representatives, warranties, and requirements (including requirements for audits) as the Board determines appropriate.

(B) PROCEDURES.—Not later than 14 days after the date of enactment of this Act, the Director of the Office of Management and Budget shall issue regulations setting forth procedures for application and minimum require ments, which may be supplemented by the Board in its discretion, for the issuance of Federal credit instruments under section 101(a)(1).

(d) FINANCIAL PROTECTION OF GOVERNMENT.—

(1) IN GENERAL.—To the extent feasible and practicable, the Board shall ensure that the Government is compensated for the risk assumed in making guarantees under this title.

(2) GOVERNMENT PARTICIPATION IN GAINS.—To the extent to which any participating corporation accepts financial assistance, in the form of accepting the proceeds of any loans guaranteed by the Government under this title, the Board is authorized to enter into contracts under which the Government, contingent on the financial success of the participating corporation, would participate in the gains of the participating corporation or its security holders through the use of such instruments as warrants, stock options, common or preferred stock, or other appropriate equity instruments.

(3) DEPOSIT IN TREASURY.—All amounts collected by the Secretary of the Treasury under this subsection shall be deposited in the Treasury as miscellaneous receipts.

SEC. 103. SPECIAL RULES FOR COMPENSATION.

(a) DOCUMENTATION.—Subject to subsection (b), the amount of compensation payable to an air carrier under

section 101(a)(2) may not exceed the amount of losses described in section 101(a)(2) that the air carrier demonstrates to the satisfaction of the President, using sworn financial statements or other appropriate data, that the air carrier incurred. The Secretary of Transportation and the Comptroller General of the United States may audit such statements and may request any information that the Secretary and the Comptroller General deems necessary to conduct such audit.

(b) MAXIMUM AMOUNT OF COMPENSATION PAYABLE PER AIR CARRIER.—The maximum total amount of compensation payable to an air carrier under section 101(a)(2) may not exceed the lesser of—

(1) the amount of such air carrier's direct and incremental losses described in section 101(a)(2); or

(2) in the case of—

(A) flights involving passenger-only or combined passenger and cargo transportation, the product of

(i) $4,500,000,000; and

(ii) the ratio of—

(I) the available seat miles of the air carrier for the month of August 2001 as reported to the Secretary; to

(II) the total available seat miles of all such air carriers for such month as reported to the Secretary; and

(B) flights involving cargo-only transportation, the product of—

(i) $500,000,000; and

(ii) the ratio of—

(I) the revenue ton miles or other auditable measure of the air carrier for cargo for the latest quarter for which data is available as reported to the Secretary; to

(II) the total revenue ton miles or other auditable measure of all such air carriers for cargo for such quarter as reported to the Secretary.

(c) PAYMENTS.—The President may provide compensation to air carriers under section 101(a)(2) in 1 or more payments up to the amount authorized by this title.

SEC. 104. LIMITATION ON CERTAIN EMPLOYEE COMPENSATION.

(a) IN GENERAL.—The President may only issue a Federal credit instrument under section 101(a)(1) to an air carrier after the air carrier enters into a legally binding agreement with the President that, during the 2-year period beginning September 11, 2001, and ending September 11, 2003, no officer or employee of the air carrier whose total compensation exceeded $300,000 in calendar year 2000 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to September 11, 2001)—

(1) will receive from the air carrier total compensation which exceeds, during any 12 consecutive months of such 2-year period, the total compensation received by the officer or employee from the air carrier in calendar year 2000; and

(2) will receive from the air carrier severance pay or other benefits upon termination of employment with the air carrier which exceeds twice the maxi-

mum total compensation received by the officer or employee from the air carrier in calendar year 2000.

(b) TOTAL COMPENSATION DEFINED.—In this section, the term "total compensation" includes salary, bonuses, awards of stock, and other financial benefits provided by an air carrier to an officer or employee of the air carrier.

SEC. 105. CONTINUATION OF CERTAIN AIR SERVICE.

(a) ACTION OF SECRETARY.—The Secretary of Transportation should take appropriate action to ensure that all communities that had scheduled air service before September 11, 2001, continue to receive adequate air transportation service and that essential air service to small communities continues without interruption.

(b) ESSENTIAL AIR SERVICE.—There is authorized to be appropriated to the Secretary to carry out the essential air service program under subchapter II of chapter 417 of title 49, United States Code, $120,000,000 for fiscal year 2002.

(c) SECRETARIAL OVERSIGHT.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary is authorized to require an air carrier receiving direct financial assistance under this Act to maintain scheduled air service to any point served by that carrier before September 11, 2001.

(2) AGREEMENTS.—In applying paragraph (1), the Secretary may require air carriers receiving direct financial assistance under this Act to enter into agreements which will ensure, to the maximum

extent practicable, that all communities that had scheduled air service before September 11, 2001, continue to receive adequate air transportation service.

SEC. 106. REPORTS.

(a) REPORT.—Not later than February 1, 2001 [sic], the President shall transmit to the Committee on Transportation and Infrastructure, the Committee on Appropriations, and the Committee on the Budget of the House of Representatives and the Committee on Commerce, Science, and Transportation, the Committee on Appropriations, and the Committee on the Budget of the Senate a report on the financial status of the air carrier industry and the amounts of assistance provided under this title to each air carrier.

(b) UPDATE.—Not later than the last day of the 7-month period following the date of enactment of this Act, the President shall update and transmit the report to the Committees.

SEC. 107. DEFINITIONS.

In this title, the following definitions apply:

(1) AIR CARRIER.—The term "air carrier" has the meaning such term has under section 40102 of title 49, United States Code.

(2) FEDERAL CREDIT INSTRUMENT.—The term "Federal credit instrument" means any guarantee or other pledge by the Board issued under section 101(a)(1) to pledge the full faith and credit of the United States to pay all or part of any of the principal of and interest on a loan or other debt obligation issued by an obligor and funded by a lender.

(3) INCREMENTAL LOSS.—The term "incremental loss" does not include any loss that the President determines would have been incurred if the terrorist attacks on the United States that occurred on September 11, 2001, had not occurred.

TITLE II—AVIATION INSURANCE

SEC. 201. DOMESTIC INSURANCE AND REIMBURSEMENT OF INSURANCE COSTS.

(a) IN GENERAL.—Section 44302 of title 49, United States Code, is amended—

(1) in subsection (a)(1)—

(A) by striking "subsection (b)" and inserting "subsection (c)"; and

(B) by striking "foreign-flag aircraft—" and all that follows through the period at the end of subparagraph (B) and inserting "foreign-flag aircraft.";

(2) by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively;

(3) by inserting after subsection (a) the following:

"(b) REIMBURSEMENT OF INSURANCE COST INCREASES.

"(1) IN GENERAL.—The Secretary may reimburse an air carrier for the increase in the cost of insurance, with respect to a premium for coverage ending before October 1, 2002, against loss or damage arising out of any risk from the operation of an American aircraft over the insurance premium that was in effect for a comparable operation during the period beginning September 4, 2001, and ending Septem-

ber 10, 2001, as the Secretary may determine. Such reimbursement is subject to subsections (a)(2), (c), and (d) of this section and to section 44303.

"(2) PAYMENT FROM REVOLVING FUND.—A reimbursement under this subsection shall be paid from the revolving fund established by section 44307.

"(3) FURTHER CONDITIONS.—The Secretary may impose such further conditions on insurance for which the increase in premium is subject to reimbursement under this subsection as the Secretary may deem appropriate in the interest of air commerce.

"(4) TERMINATION OF AUTHORITY.—The authority to reimburse air carriers under this subsection shall expire 180 days after the date of enactment of this paragraph.";

(4) in subsection (c) (as so redesignated)—

(A) in the first sentence by inserting ", or reimburse an air carrier under subsection (b) of this section," before "only with the approval"; and

(B) in the second sentence—

(i) by inserting "or the reimbursement" before "only after deciding"; and

(ii) by inserting "in the interest of air commerce or national security or" before "to carry out the foreign policy"; and

(5) in subsection (d) (as so redesignated) by inserting "or reimbursing an air carrier" before "under this chapter".

(b) COVERAGE.—

(1) IN GENERAL.—Section 44303 of such title is amended—

(A) in the matter preceding paragraph (1) by inserting ", or reimburse insurance costs, as" after "insurance and reinsurance"; and

(B) in paragraph (1) by inserting "in the interest of air commerce or national security or" before "to carry out the foreign policy".

(2) DISCRETION OF THE SECRETARY.—For acts of terrorism committed on or to an air carrier during the 180-day period following the date of enactment of this Act, the Secretary of Transportation may certify that the air carrier was a victim of an act of terrorism and in the Secretary's judgment, based on the Secretary's analysis and conclusions regarding the facts and circumstances of each case, shall not be responsible for losses suffered by third parties (as referred to in section 205.5(b)(1) of title 14, Code of Federal Regulations) that exceed $100,000,000, in the aggregate, for all claims by such parties arising out of such act. If the Secretary so certifies, the air carrier shall not be liable for an amount that exceeds $100,000,000, in the aggregate, for all claims by such parties arising out of such act, and the Government shall be responsible for any liability above such amount. No punitive damages may be awarded against an air carrier (or the Government taking responsibility for an air carrier under this paragraph) under a cause of action arising out of such act.

(c) REINSURANCE.—Section 44304 of such title is amended—

(1) by striking "(a) GENERAL AUTHORITY. —"; and

(2) by striking subsection (b).

(d) PREMIUMS.—Section 44306 of such title is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) ALLOWANCES IN SETTING PREMIUM RATES FOR REINSURANCE.—In setting premium rates for reinsurance, the Secretary may make allowances to the insurance carrier for expenses incurred in providing services and facilities that the Secretary considers good business practices, except for payments by the air carrier for the stimulation or solicitation of insurance business.".

(e) CONFORMING AMENDMENT.—Section 44305(b) of such title is amended by striking "44302(b)" and inserting "44302(c)".

SEC. 202. EXTENSION OF PROVISIONS TO VENDORS, AGENTS, AND SUBCONTRACTORS OF AIR CARRIERS.

Notwithstanding any other provision of this title, the Secretary may extend any provision of chapter 443 of title 49, United States Code, as amended by this title, and the provisions of this title, to vendors, agents, and subcontractors of air carriers. For the 180-day period beginning on the date of enactment of this Act, the Secretary may extend or amend any such provisions so as to ensure that the entities referred to in the preceding sentence are not responsible in cases of acts of terrorism for losses suffered by third parties that exceed the amount of

such entities' liability coverage, as determined by the Secretary.

TITLE III—TAX PROVISIONS

SEC. 301. EXTENSION OF DUE DATE FOR EXCISE TAX DEPOSITS; TREATMENT OF LOSS COMPENSATION.

(a) EXTENSION OF DUE DATE FOR EXCISE TAX DEPOSITS.—

(1) IN GENERAL.—In the case of an eligible air carrier, any airline-related deposit required under section 6302 of the Internal Revenue Code of 1986 to be made after September 10, 2001, and before November 15, 2001, shall be treated for purposes of such Code as timely made if such deposit is made on or before November 15, 2001. If the Secretary of the Treasury so prescribes, the preceding sentence shall be applied by substituting for "November 15, 2001" each place it appears

(A) "January 15, 2002"; or

(B) such earlier date after November 15, 2001, as such Secretary may prescribe.

(2) ELIGIBLE AIR CARRIER.—For purposes of this subsection, the term "eligible air carrier" means any domestic corporation engaged in the trade or business of transporting (for hire) persons by air if such transportation is available to the general public.

(3) AIRLINE-RELATED DEPOSIT.—For purposes of this subsection, the term "airline-related deposit" means any deposit of—

(A) taxes imposed by subchapter C of chapter 33 of such Code (relating to transportation by air); and

(B) taxes imposed by chapters 21, 22, and 24 with respect to employees engaged in a trade or business referred to in paragraph (2).

(b) TREATMENT OF LOSS COMPENSATION.—Nothing in any provision of law shall be construed to exclude from gross income under the Internal Revenue Code of 1986 any compensation received under section 101(a)(2) of this Act.

TITLE IV—VICTIM COMPENSATION

SEC. 401. SHORT TITLE.

This title may be cited as the "September 11th Victim Compensation Fund of 2001".

SEC. 402. DEFINITIONS.

In this title, the following definitions apply:

(1) AIR CARRIER.—The term "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation and includes employees and agents of such citizen.

(2) AIR TRANSPORTATION.—The term "air transportation" means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.

(3) CLAIMANT.—The term "claimant" means an individual filing a claim for compensation under section 405(a)(1).

(4) COLLATERAL SOURCE.—The term "collateral source" means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.

(5) ECONOMIC LOSS.—The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(6) ELIGIBLE INDIVIDUAL.—The term "eligible individual" means an individual determined to be eligible for compensation under section 405(c).

(7) NONECONOMIC LOSSES.—The term "noneconomic losses" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

(8) SPECIAL MASTER.—The term "Special Master" means the Special Master appointed under section 404(a).

SEC. 403. PURPOSE.

It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual)

who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.

SEC. 404. ADMINISTRATION.

(a) IN GENERAL.—The Attorney General, acting through a Special Master appointed by the Attorney General, shall—

(1) administer the compensation program established under this title;

(2) promulgate all procedural and substantive rules for the administration of this title; and

(3) employ and supervise hearing officers and other administrative personnel to perform the duties of the Special Master under this title.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Special Master in carrying out this title.

SEC. 405. DETERMINATION OF ELIGIBILITY FOR COMPENSATION.

(a) FILING OF CLAIM.

(1) IN GENERAL.—A claimant may file a claim for compensation under this title with the Special Master. The claim shall be on the form developed under paragraph (2) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.

(2) CLAIM FORM.

(A) IN GENERAL.—The Special Master shall develop a claim form that claimants shall use

when submitting claims under paragraph (1). The Special Master shall ensure that such form can be filed electronically, if determined to be practicable.

(B) CONTENTS.—The form developed under subparagraph (A) shall request—

(i) information from the claimant concerning the physical harm that the claimant suffered, or in the case of a claim filed on behalf of a decedent information confirming the decedent's death, as a result of the terrorist-related aircraft crashes of September 11, 2001;

(ii) information from the claimant concerning any possible economic and noneconomic losses that the claimant suffered as a result of such crashes; and

(iii) information regarding collateral sources of compensation the claimant has received or is entitled to receive as a result of such crashes.

(3) LIMITATION.—No claim may be filed under paragraph (1) after the date that is 2 years after the date on which regulations are promulgated under section 407.

(b) REVIEW AND DETERMINATION.

(1) REVIEW.—The Special Master shall review a claim submitted under subsection (a) and determine—

(A) whether the claimant is an eligible individual under subsection (c);

(B) with respect to a claimant determined to be an eligible individual—

(i) the extent of the harm to the claimant, including any economic and noneconomic losses; and

(ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.

(2) NEGLIGENCE.—With respect to a claimant, the Special Master shall not consider negligence or any other theory of liability.

(3) DETERMINATION.—Not later than 120 days after that date on which a claim is filed under subsection (a), the Special Master shall complete a review, make a determination, and provide written notice to the claimant, with respect to the matters that were the subject of the claim under review. Such a determination shall be final and not subject to judicial review.

(4) RIGHTS OF CLAIMANT.—A claimant in a review under paragraph (1) shall have—

(A) the right to be represented by an attorney;

(B) the right to present evidence, including the presentation of witnesses and documents; and

(C) any other due process rights determined appropriate by the Special Master.

(5) NO PUNITIVE DAMAGES.—The Special Master may not include amounts for punitive damages in any compensation paid under a claim under this title.

(6) COLLATERAL COMPENSATION.—The Special Master shall reduce the amount of compensation determined under paragraph (1)(B)(ii) by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001.

(c) ELIGIBILITY.

(1) IN GENERAL.—A claimant shall be determined to be an eligible individual for purposes of this subsection if the Special Master determines that such claimant

(A) is an individual described in paragraph (2); and (B) meets the requirements of paragraph (3).

(2) INDIVIDUALS.—A claimant is an individual described in this paragraph if the claimant is—

(A) an individual who—

(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and

(ii) suffered physical harm or death as a result of such an air crash;

(B) an individual who was a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175, except that an individual identified by the Attorney General to have been a participant or conspirator in the terrorist-related aircraft crashes of September 11, 2001, or a representative of such individual shall not be eligible to receive compensation under this title; or

(C) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent.

(3) REQUIREMENTS.

(A) SINGLE CLAIM.—Not more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.

(B) LIMITATION ON CIVIL ACTION.—

(i) IN GENERAL.—Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations.

(ii) PENDING ACTIONS.—In the case of an individual who is a party to a civil action described in clause (i), such indi-

vidual may not submit a claim under this title unless such individual withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 407.

SEC. 406. PAYMENTS TO ELIGIBLE INDIVIDUALS.

(a) IN GENERAL.—Not later than 20 days after the date on which a determination is made by the Special Master regarding the amount of compensation due a claimant under this title, the Special Master shall authorize payment to such claimant of the amount determined with respect to the claimant.

(b) PAYMENT AUTHORITY.—This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title.

(c) ADDITIONAL FUNDING.

(1) IN GENERAL.—The Attorney General is authorized to accept such amounts as may be contributed by individuals, business concerns, or other entities to carry out this title, under such terms and conditions as the Attorney General may impose.

(2) USE OF SEPARATE ACCOUNT.—In making payments under this section, amounts contained in any account containing funds provided under paragraph (1) shall be used prior to using appropriated amounts.

SEC. 407. REGULATIONS.

Not later than 90 days after the date of enactment of this Act, the Attorney General, in consultation with the Special Master, shall promulgate regulations to carry out this title, including regulations with respect to—

(1) forms to be used in submitting claims under this title;

(2) the information to be included in such forms;

(3) procedures for hearing and the presentation of evidence;

(4) procedures to assist an individual in filing and pursuing claims under this title; and

(5) other matters determined appropriate by the Attorney General.

SEC. 408. LIMITATION ON AIR CARRIER LIABILITY.

(a) IN GENERAL.—Notwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.

(b) FEDERAL CAUSE OF ACTION.

(1) AVAILABILITY OF ACTION.—There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of title 49, United States

Code, this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.

(2) SUBSTANTIVE LAW.—The substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.

(3) JURISDICTION.—The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

(c) EXCLUSION.—Nothing in this section shall in any way limit any liability of any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

SEC. 409. RIGHT OF SUBROGATION.

The United States shall have the right of subrogation with respect to any claim paid by the United States under this title.

TITLE V—AIR TRANSPORTATION SAFETY

SEC. 501. INCREASED AIR TRANSPORTATION SAFETY.

Congress affirms the President's decision to spend $3,000,000,000 on airline safety and security in conjunction with this Act in order to restore public confidence in the airline industry.

SEC. 502. CONGRESSIONAL COMMITMENT.

Congress is committed to act expeditiously, in consultation with the Secretary of Transportation, to strengthen airport security and take further measures to enhance the security of air travel.

TITLE VI—SEPARABILITY

SEC. 601. SEPARABILITY.

If any provision of this Act (including any amendment made by this Act) or the application thereof to any person or circumstance is held invalid, the remainder of this Act (including any amendment made by this Act) and the application thereof to other persons or circumstances shall not be affected thereby.

Approved September 22, 2001.

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No. 05-484

In the Supreme Court of the United States

ALBERTO SANCHEZ-VILLALOBOS, AKA FRANCISCO SANCHEZ-SAENZ, AKA VILLALOBOS-SANCHEZ,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior state conviction for possession of a controlled substance was an "aggravated felony" triggering a recommended sentence enhancement under Section 2L1.2(b)(1)(C) of the Sentencing Guidelines.

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In the Supreme Court of the United States

No. 05-484

ALBERTO SANCHEZ-VILLALOBOS, AKA FRANCISCO SANCHEZ-SAENZ, AKA VILLALOBOS-SANCHEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-8a) is reported at 412 F.3d 572. The judgment of the district court (Pet. App. 11a-18a) is unreported.

JURISDICTION

The court of appeals entered its judgment on June 7, 2005. A petition for rehearing was denied on July 13, 2005 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on October 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Western District of Texas, petitioner was

convicted of illegal reentry into the United States after prior deportation, in violation of 8 U.S.C. 1326. The district court sentenced petitioner to 20 months of imprisonment, to be followed by a one-year, non-reporting term of supervised release. Pet. App. 12a-13a, 16a. The court of appeals affirmed.

1. Under 8 U.S.C. 1326, Congress set the baseline maximum sentence for illegal reentry at two years of imprisonment. 8 U.S.C. 1326(a). The Sentencing Guidelines provide a base offense level of eight for illegal reentry and authorize an eight-level upward adjustment if the defendant committed an "aggravated felony" before removal. Sentencing Guidelines § 2L1.2(b)(1)(C). The Sentencing Guidelines adopt the definition of "aggravated felony" contained in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43). See Sentencing Guidelines § 2L1.2, comment. (n.3(A)). Section 1101(a)(43)(B), in turn, defines "aggravated felony" to include a "drug trafficking crime," as defined in 18 U.S.C. 924(c). Finally, Section 924(c)(2) defines a "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*)."

2. In September 2001, petitioner was convicted in Colorado for possession of codeine, a controlled substance. Pet. App. 2a. Under Colorado law, that offense is classified as a class 1 misdemeanor and is punishable by up to 18 months of imprisonment. *Ibid.* (citing Colo. Rev. Stat. § 18-1.3-501(a) (2001)). Petitioner was sentenced to 60 days of imprisonment. Pet. App. 2a. After completing his sentence, he was removed from the United States. *Ibid.* Petitioner reentered the United States illegally, and, in 2004, he pleaded guilty to one charge of illegal reentry, in violation of 8 U.S.C. 1326. Pet. App. 2a.

At sentencing, the district court applied the Sentencing Guidelines' eight-level enhancement for illegal reentry where the prior removal followed the commission of an aggravated felony, based on petitioner's Colorado conviction for codeine possession. Pet. App. 2a. The district court then sentenced petitioner to 20 months of imprisonment, to be followed by a one-year, non-reporting term of supervised release. *Id.* at 2a, 12a-13a.

3. The court of appeals affirmed. Pet. App. 1a-8a. The court held that petitioner's prior controlled substance offense would constitute a "drug trafficking crime" under 18 U.S.C. 924(c)(2), and thus would qualify as an "aggravated felony" for purposes of the Sentencing Guidelines, if "(1) * * * the offense [is] punishable under the Controlled Substances Act," and "(2) * * * the offense [is] a felony under either state *or* federal law." Pet. App. 3a. Because it was "undisputed that [petitioner's] possession of codeine would be punishable under the [Controlled Substances Act], specifically 21 U.S.C. § 844(a)," the court's "central task" was to determine whether the controlled substance offense constitutes a felony under either state or federal law. Pet. App. 3a. The court held that the offense was a felony under federal law on two alternative grounds.

First, the court of appeals concluded that petitioner's codeine possession was a felony because it was punishable by more than one year in prison. Pet. App. 6a. The court noted that the Controlled Substances Act expressly defines a "felony drug offense" as a controlled substance offense under state or federal law "that is punishable by imprisonment for more than one year." *Id.* at 4a (quoting 21 U.S.C. 802(44)); see *id.* at 6a. The court further noted that "federal law traditionally

equates the term felony with offenses punishable by more than one year imprisonment." *Id.* at 6a.

Second, the court held that petitioner's conviction for codeine possession was a qualifying felony because it could have been punished as a felony under the Controlled Substances Act itself. Pet. App. 7a. More specifically, the court noted that petitioner was a recidivist controlled-substance offender, having also been convicted of marijuana possession in 1997. *Ibid.* Accordingly, under 21 U.S.C. 844(a), petitioner's conduct was punishable under the Controlled Substances Act itself by up to two years of imprisonment. Pet. App. 7a.[1]

ARGUMENT

Petitioner's challenge to the court of appeals' unanimous opinion upholding the district court's application of the Sentencing Guidelines does not warrant this Court's review. Petitioner has now completed the term of imprisonment that he challenges and has been removed from the United States. The Court's resolution of this case thus would have little, if any, practical impact on petitioner himself. Furthermore, the question of Sentencing Guidelines construction that petitioner poses can better be resolved, if necessary, by the Sentencing Commission. Finally, it is unlikely that petitioner's case would have been resolved differently in any other circuit. The case accordingly does not reflect the

[1] The court of appeals also rejected petitioner's argument that his sentence violated *United States* v. *Booker*, 543 U.S. 220 (2005), because the district court applied the Sentencing Guidelines as mandatory. The court of appeals refused to consider that claim because petitioner had failed to raise it in his opening brief to the court. Pet. App. 8a. Petitioner has not renewed that claim before this Court.

type of concrete and consequential conflict in courts of appeals' opinions that warrants this Court's review.

1. Petitioner argues (Pet. 8-19) that his term of imprisonment was improper because the district court applied an eight-level increase in his offense level for commission of an aggravated felony before removal. As petitioner acknowledges (Pet. 7), however, he completed the term of imprisonment that he challenges on August 18, 2005, and has been removed to Mexico. "The [i]ncarceration that he incurred * * * is now over, and cannot be undone." *Spencer* v. *Kemna*, 523 U.S. 1, 8 (1998).

Petitioner argues (Pet. 7 n.3) that the case is not moot because he remains on supervised release. But because petitioner no longer resides in the United States, review in this case could not have the type of practical effect on petitioner's sentence that would warrant an exercise of this Court's certiorari jurisdiction, for three reasons.

First, petitioner is on a quite limited form of supervised release. The district court ordered that, if petitioner were removed from the United States after serving his term of imprisonment, his term of supervised release would be a "non-reporting" term. Pet. App. 13a, 16a. The principal condition is that, were petitioner again to enter the United States illegally, his supervised release could be revoked, *id.* at 16a, and the new offense of illegal reentry could result in an enhanced sentence, see 8 U.S.C. 1326(b).

Beyond that, the term of supervised release has no tangible effect on petitioner's liberty. Because petitioner now resides in Mexico, he is not presently under the jurisdiction, custody, or control of the United States government. He has no obligation to report to any United States probation official, and federal probation

officials are not monitoring or constraining his activities in any manner. Such a condition, which has no practical impact on petitioner unless he chooses to engage in further criminal activity by again illegally reentering the United States, does not amount to the type of legal burden that warrants this Court's certiorari review. Cf. *Spencer*, 523 U.S. at 13, 15.[2]

Second, whatever the impact of the aggravated-felony enhancement on petitioner's now-completed term of imprisonment, petitioner does not contend that the increase in his offense level had any effect on the length of his term of supervised release. In fact, Section 3583(b)(3) of Title 18 authorizes a one-year term of supervised release in this case regardless of whether petitioner previously committed an aggravated felony. Further, this Court made clear in *Johnson* v. *United States*, 529 U.S. 53 (2000), that excess prison time cannot be credited against a term of supervised release. It thus appears doubtful that resolution of the questions presented, even if petitioner prevailed, would have any effect on the length of the term of supervised release that petitioner is currently serving.

Third, according to the Bureau of Prisons, petitioner's term of supervised release will expire in eight months (on August 17, 2006). Thus, even were the Court to grant review and decide the case this Term, a decision in petitioner's favor would have at most a fleeting impact on his term of supervised release.

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[2] For that reason, petitioner's reliance (Pet. 7 n.3) on *Jago* v. *Van Curen*, 454 U.S. 14 (1981), is misplaced. There, the release of the defendant on parole did not render a case moot because of the continuing governmental control over the defendant. Here, petitioner is no longer subject to "terms that significantly restrict his freedom." *Jago*, 454 U.S. at 21 n.3.

Petitioner also argues (Pet. 7 n.3) that the case is not moot because of potential collateral consequences of the sentence. That is debatable. *United States* v. *Campos-Serrano*, 404 U.S. 293 (1971), and *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983), on which petitioner relies (Pet. 7 n.3), are inapt. Those cases were not mooted by a defendant's removal because it was the *government* that sought this Court's review to reinstate an overturned criminal *conviction*. Reinstatement of that conviction could have led to extradition of the defendants, and the existence of the convictions could have had distinct immigration consequences. See *Villamonte-Marquez*, 462 U.S. at 581 n.2; *Campos-Serrano*, 404 U.S. at 295. Here, it is the defendant who seeks review, and only of his criminal sentence—a sentence that is just months away from being fully served and that has no present-day, practical effect on his liberty.

Further, the prospective effect of the soon-to-expire sentence would arise only if petitioner again violates United States law by again reentering the United States illegally. Neither mootness principles nor this Court's certiorari practice is designed to insulate a defendant in advance from the consequences of future crimes by permitting challenges to almost-expired sentences. Petitioner himself is "able—and indeed required by law—to prevent" the adverse consequences he hypothesizes "from occurring." *Spencer*, 523 U.S. at 15 (quoting *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982)).[3]

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[3] Nor is certiorari review warranted because of the mere possibility of unspecified collateral consequences from the length of the petitioner's sentence. Cf. *Spencer*, 523 U.S. at 9-11 (citing *Pollard* v. *United States*, 352 U.S. 354 (1957), which permitted a challenge to the length of a completed sentence based on the non-specific "possibility" of collateral consequence, *id.* at 358, but criticizing *Pollard's* analysis as

Petitioner claims (Pet. 7 n.3) that the potential collateral consequences of the conviction on his future immigration status are sufficient to prolong the controversy and to merit this Court's review. That is incorrect. Petitioner fails to identify any independent impact that classifying his codeine possession conviction as an aggravated felony would have on any future immigration application, given that he already has that prior controlled substance conviction (however classified), a prior marijuana conviction, and now a federal felony conviction for illegal reentry. See 8 U.S.C. 1101(a)(43)(B) and (O).[4]

"offhand[]," effectively "abandon[ing] all inquiry into the actual existence of collateral consequences," and relying upon a misunderstanding of the constitutional importance of standing and mootness principles to the separation of powers); *North Carolina* v. *Rice*, 404 U.S. 244, 247-248 (1971) (per curiam) (challenges to completed sentences require a different mootness analysis than challenges to convictions).

[4] Amici Immigrant Defense Project *et al.* express concern (Br. 5-20) about the potential consequences in immigration cases of differing interpretations of the various statutory provisions that happen to be cross-referenced by the Sentencing Guidelines here. Whether this Court's review of the proper interpretation of the statutory definition of "aggravated felony" in immigration cases is warranted, however, would better be determined in an immigration case that actually presents such consequences and that arises directly under one of those statutory provisions. See Pet. at i, *Lopez* v. *Gonzales*, petition for cert. pending, No. 05-547 (filed Oct. 31, 2005) (presenting the question whether "an immigrant who is convicted in state court of a drug crime that is a felony under the state's law, but that would only be a misdemeanor under federal law, has committed an 'aggravated felony' for purposes of the immigration laws"). A number of courts have recognized that the definition of "aggravated felony" for criminal sentencing purposes may differ from the definition employed administratively in immigration proceedings. Compare *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 919 (9th Cir. 2004) (state drug offense is not an

2. Petitioner makes no claim that his sentence contravened any federal statutory law. Nor could he. Even without a prior aggravated felony, petitioner's 20-month sentence falls within the statutorily authorized sentencing range of two years for an illegal reentry conviction. 8 U.S.C. 1326(a).

This case thus solely concerns the court's interpretation and application of the Sentencing Guidelines. Congress has charged the Sentencing Commission with "periodically review[ing] the work of the courts, and * * * mak[ing] whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). Given the Commission's statutory charge to resolve the type of claims raised by petitioner, this Court has adopted a policy of "restrained and circumscribed" use of its "certiorari power as the primary means of resolving such conflicts," *ibid.*, and there is no reason to depart from that practice here.

Petitioner in fact concedes (Pet. 2 n.1) that this case "formally involves" only a Sentencing Guidelines question, but urges (*ibid.*) a departure from *Braxton* because the courts of appeals' decisions have involved the interpretation of statutory provisions cross-referenced by the

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aggravated felony for immigration purposes unless it is punishable as a felony under federal law), with *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000) (felony under state law is an aggravated felony under the Sentencing Guidelines even if it is a misdemeanor under federal law), cert. denied, 531 U.S. 1102 (2001); and compare *Aguirre* v. *INS*, 79 F.3d 315, 317-318 (2d Cir. 1996) (felony under state law is not an aggravated felony precluding waiver from deportation if offense is not a felony under federal law), with *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-146 (2d Cir.) (felony under state law is an aggravated felony for Sentencing Guidelines purposes even if it is a misdemeanor under federal law), cert. denied, 528 U.S. 880 (1999).

relevant Guidelines provision. That is beside the point, because the Commission retains the authority to resolve any interpretive difficulties by either eliminating the statutory cross-references or tailoring their incorporation to conform to the Commission's intended construction. See *Neal* v. *United States*, 516 U.S. 284 (1996) (although statutory definitions control minimum and maximum sentences, noting instance in which the Sentencing Commission adopted other meanings of the same terms to determine the sentence within a statutorily prescribed range).

Indeed, the Commission has already done just that with respect to other aspects of the same Guidelines provision at issue here, adopting Guidelines-specific definitions of "felony" and "drug trafficking offense" for purposes of the upward adjustments authorized by Sentencing Guidelines §§ 2L1.2(b)(1)(A)(i), 2L1.2(b)(1)(B) and 2L1.2(b)(1)(D). Compare Sentencing Guidelines § 2L1.2 comment. (n.1(B)(iv)) (defining "drug trafficking offense" as "an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, export, distribute, or dispense"), with 18 U.S.C. 924(c)(2) (defining "drug trafficking crime" to include mere possession offenses punishable under the Controlled Substances Act and other federal drug statutes). In addition, the Guidelines already define "felony," for purposes of §§ 2L1.2(b)(1)(A), (B) and (D), as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year," *id.* comment. (n.2). Were the Commission to apply that same definitional approach to the subsection at issue here or were it to

prescribe its own clarification of the "aggravated felony" provision's compass, that would eliminate the interpretive problem that petitioner asks this Court to resolve.

3. The variations in the approaches taken by courts of appeals that petitioner identifies are not sufficiently substantial in the Sentencing Guidelines context to have had an identifiable effect on the outcome in this case, much less to warrant this Court's review.

The question presented by petitioner arises only when the prior conviction (i) is punishable by imprisonment for more than one year, but (ii) is denominated a misdemeanor under state law, and (iii) has been preceded by another state-law drug conviction. Almost every court of appeals to consider that question in the sentencing context has determined that a prior conviction like petitioner's would constitute an "aggravated felony" within the meaning of the Sentencing Guidelines, and it does not appear that any circuit would find that petitioner's drug-possession offense was not an aggravated felony.

The First and Ninth Circuits have held, like the Fifth Circuit here (Pet. App. 4a-7a), that the Guidelines' definition of "aggravated felony" includes "misdemeanors under state law that carry a sentence of at least one year." *United States* v. *Cordoza-Estrada*, 385 F.3d 56, 58 (1st Cir. 2004); *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002); cf. *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364 (1st Cir. 1996) (state offense need not be punishable as a felony under federal law, as long as the offense conduct is "criminalized under the [Controlled Substances Act]").

The First, Second, Sixth, Eighth, and Tenth Circuits likewise agree with the Fifth Circuit's ruling here (Pet. App. 7a-8a) that, because of his recidivist character, peti-

tioner's conviction for codeine possession would be a felony under federal law and thus qualifies as an aggravated felony for sentencing purposes. See *United States* v. *Forbes*, 16 F.3d 1294, 1301 (1st Cir. 1994); *United States* v. *Simpson*, 319 F.3d 81, 85-86 & n.6 (2d Cir. 2002); *United States* v. *Palacios-Suarez*, 418 F.3d 692, 694-700 (6th Cir. 2005); *United States* v. *Haggerty*, 85 F.3d 403, 406 (8th Cir. 1996); *United States* v. *Miramontes-Lamas*, No. 97-4130, 1998 WL 50955, at * 1 (10th Cir. Feb. 9, 1998) (judgment noted at 139 F.3d 913 (Table)); see *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir.) (prior drug-possession offense is considered an aggravated felony if the offense is considered a felony under either state or federal law), cert. denied, 519 U.S. 885 (1996).[5]

At bottom, petitioner's broad characterization of the courts of appeals' differing approaches (Pet. 8-14) fails to recognize that *no* court of appeals has held that a recidivist conviction of a state drug offense punishable by more than one year in prison is not an aggravated felony under the Sentencing Guidelines. Petitioner has thus

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[5] The Fourth Circuit has held that a state drug-possession offense categorized by the state as a misdemeanor is not an aggravated felony, even though it was punishable under state law by more than one year of imprisonment. *United States* v. *Amaya-Portillo*, 423 F.3d 427, 430-436 (2005). But the Fourth Circuit has not specifically addressed the question whether the recidivist provision of 18 U.S.C. 844(a) may be considered in determining that the prior offense could have been prosecuted as a felony under federal law. The Fourth Circuit has held, however, that a state-law offense will qualify as an "aggravated felony" if it would be a felony under federal law. *United States* v. *Wilson*, 316 F.3d 506, 512 (4th Cir.), cert. denied, 538 U.S. 1025 (2003). It thus is doubtful that the Fourth Circuit would resolve petitioner's case differently.

failed to show that *his case* implicates any material divergence in circuit court authority.[6]

4. Contrary to petitioner's argument (Pet. 16-18), the court of appeals' decision is consistent with this Court's decisions in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Taylor* v. *United States*, 495 U.S. 575 (1990). In *Almendarez-Torres*, this Court held that, when a prior conviction is used to enhance the penalty for an offense, it does not need to be charged in the indictment, because the prior conviction is a sentencing factor, not an element of the offense. Because petitioner's sentence does not exceed the statutory maximum for illegal reentry (with or without a prior aggravated felony), 8 U.S.C. 1326(a), the court of appeals' reference to the recidivist character of his prior drug offense occurred only in the context of determining his appropriate sentence and served only as a sentencing enhancement, which *Almendarez-Torres* specifically permits.

In *Taylor*, *supra*, this Court held that whether an offense constitutes "burglary," for purposes of the definition of "violent felony" in 18 U.S.C. 924(e), is a question of federal law that is not controlled by how a State

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[6] Petitioner's argument (Pet. 10-11) that his case might have been resolved differently if it were a civil immigration proceeding arising under the immigration laws, rather than a criminal sentencing within the framework of the Sentencing Guidelines, does not warrant this Court's review. The Sentencing Commission is not bound to adopt the same definition of sentencing terms that Congress statutorily prescribes for immigration proceedings. See *Gerbier* v. *Holmes*, 280 F.3d 297, 307 (3d Cir. 2002) ("Whatever may be the proper construction in a Sentencing Guidelines case, we do not agree that the plain meaning of 'drug trafficking crime' under § 924(c) in the deportation context encompasses state felony convictions that would merely be misdemeanors under federal law.").

might define "burglary" under state law. 495 U.S. at 590-592; see *id.* at 592-599. That case has little bearing on the questions presented here, other than to confirm the appropriateness of the court of appeals' refusal to allow the state-law characterization of petitioner's prior offense to control the federal question of whether it amounted to an "aggravated felony."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ALBERTO SANCHEZ-VILLALOBOS,
A/K/A ALBERTO VILLALOBOS SANCHEZ,
A/K/A FRANCISCO SANCHEZ SAENZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE IMMIGRANT DEFENSE PROJECT OF THE NEW YORK STATE DEFENDERS ASSOCIATION, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND IMMIGRANT LEGAL RESOURCE CENTER

IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The deep and growing split among the circuit courts concerning the proper application of the "aggravated felony" label to state drug offenses has broad significance for non-citizens and their advocates. Although the issues presented in this case arise in the illegal re-entry context, their resolution has profound implications for a wide array of immigration matters, including eligibility for asylum, citizenship, and basic forms of relief from removal.[2] The current circuit split regarding the application of the aggravated felony label makes it challenging, if not virtually impossible, for amici to advise immigrants effectively and to train advocates about the potential immigration consequences of misdemeanor drug possession convictions. As organizations concerned with the intersection of immigration and criminal law, amici urge the Court to resolve the important issues raised in this case.

The **New York State Defenders Association** (NYSDA) is a not-for-profit membership association of more than 1400 public defenders, legal aid attorneys, assigned counsel, and others dedicated to developing and supporting high quality legal defense

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amici state that no counsel for a party authored any part of the brief, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Immigration judges apply the rule of the circuit in which they sit, whether that rule was announced in an illegal re-entry or an immigration case. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 394–396 (BIA 2002). Furthermore, some circuits, including the Fifth Circuit, apply the same interpretation of the aggravated felony label in illegal re-entry and immigration cases. *See, e.g., United States v. Hernandez-Avalos*, 251 F.3d 505, 509–10 (5th Cir. 2001).

services for all people, regardless of income. Among other initiatives, NYSDA operates the **Immigrant Defense Project** (IDP), which provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law.

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

The **Immigrant Legal Resource Center** (ILRC) is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status and the immigration consequences of criminal convictions.

SUMMARY OF ARGUMENT

The circuit courts currently apply the aggravated felony label in sharply divergent ways. In treating petitioner's misdemeanor codeine possession conviction, with its sixty day jail sentence, as a crime within the meaning of 8 U.S.C. § 1101(a)(43)(B) ("illicit trafficking in a controlled substance"), the Fifth Circuit adopted one of the broadest and most far-reaching interpretations of the term "aggravated felony" that courts have thus far employed.[3]

The discord among the circuits affects individual immigrants nationwide. In accordance with long-standing practices, the Department of Homeland Security (DHS) often detains a non-citizen with a misdemeanor drug possession conviction in a jurisdiction outside the federal circuit in which the conviction occurred, and often transfers the non-citizen several times from one detention facility to another. Non-citizens convicted in New York, for example, are regularly transferred to detention facilities dispersed across the country, including the facility in Oakdale, Louisiana. Because immigration judges apply the law of the circuit in which they sit, and because DHS routinely transfers detainees from one location to another, the split among the circuits has a dramatic impact on individual immigrants.

Virtually all non-citizens, including lawful permanent residents, are deportable if they have been convicted of a drug-related offense. When that drug offense is labeled an "aggravated felony," immigration judges are barred from granting asylum and several basic forms of relief from removal, no matter how harmful removal may be for the non-citizen or his family. This is true even for lawful permanent residents who have spent most of their lives

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[3] *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005).

in the United States, asylum seekers who have experienced or reasonably fear persecution in their home countries, members of the U.S. Armed Forces, and immigrants with U.S. citizen spouses and children.

In New York, as in other states, misdemeanor cases are handled in a summary fashion, without significant procedural safeguards. The relatively perfunctory processing of misdemeanor cases is rooted in the understanding that misdemeanor defendants face less serious direct and collateral consequences as a result of conviction. Courts that would apply the aggravated felony label even to misdemeanor drug possession offenses would nonetheless bar immigrants with such convictions from discretionary relief or defenses to removal that would otherwise be available to them. Though they were convicted of the most minor drug possession offenses that exist within state penal codes, many non-citizens now find themselves subject to one of U.S. immigration law's most severe classifications.

Given the severity of the penalties that follow the application of the aggravated felony label, the uncertainty that has resulted from the circuit courts' multitude of different interpretations of the term should now be resolved. The proliferation of conflicting interpretations of the term undermines the rule of law. It is virtually impossible for an advocate to advise her client effectively about the possible future consequences of a conviction when that conviction can lead to vastly different consequences depending on where in the country that client is haled into immigration court.

Amici request that the Supreme Court grant certiorari to resolve the clear and growing circuit division about the appropriate application of the aggravated felony label.

REASONS FOR GRANTING THE WRIT

I. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE GOVERNMENT MAY DETAIN ANY NON-CITIZEN IN ANY CIRCUIT, LEADING TO THE ARBITRARY APPLICATION OF THE AGGRAVATED FELONY LABEL

There is a clear and growing split among the circuit courts concerning how to determine whether a state-law drug possession offense fits the aggravated felony definition of "illicit trafficking in a controlled substance."[4] The circuits are divided over whether a state-law offense should be considered an aggravated felony if it is a felony under state law, punishable as a felony under federal law, or, in the most extreme position (taken by the Fifth Circuit in this case), either a felony under state law *or* punishable as a felony under federal law. The circuits are also divided over the relevance of recidivist enhancements in determining whether a state-law offense should be classified as a federal felony. Finally, the circuits are divided over whether the potential punishment under state law or the classification applied by the state (i.e., misdemeanor or felony) should govern whether a state-law drug possession offense is an aggravated felony.

The split results in far more than the obvious effect of subjecting individuals with similar convictions to different law in different parts of the country. The Board of Immigration Appeals (BIA) has held that in determining whether a drug conviction constitutes an aggravated felony, immigration judges must defer to

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[4] For a complete summary of the circuit splits, see Petition of Petitioner-Appellant for a Writ of Certiorari, *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), *petition for cert. filed*, No. 05-484 (Oct. 14, 2005).

the interpretation given to the phrase "illicit trafficking in a controlled substance" by the circuit in which they sit.[5] DHS may detain a non-citizen in any detention facility in the country; that non-citizen will be forced to appear before an immigration judge while in detention. Given the current splits among the circuits, DHS' practice of detaining non-citizens in facilities throughout the country, without regard to the state in which they reside or the state in which the conviction occurred, means that any circuit's rule may apply to any one individual.

Non-citizens placed in detention in New York, for example, are commonly transferred to Passaic, New Jersey (with hearings before immigration judges in New York City, in the Second Circuit), York, Pennsylvania (Third Circuit), or Oakdale, Louisiana (Fifth Circuit). Each of these jurisdictions applies a different rule regarding whether and under what circumstances a state misdemeanor drug possession conviction may constitute an aggravated felony. As a result, a New York resident will face wildly different immigration consequences depending solely upon where the government chooses to detain her. A long-time lawful permanent resident with U.S. citizen children who has a New York misdemeanor possession conviction, if detained in Louisiana, may be deemed to have been convicted of an aggravated felony and denied any possibility of relief from removal. The same person convicted of the same misdemeanor offense, if detained in Pennsylvania, will be eligible for cancellation of removal, permitting her to remain in the United States to care for her children.

Furthermore, individuals are commonly detained in several different circuits during the course of the removal process. A

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[5] *Yanez-Garcia*, 23 I. & N. Dec. at 396.

typical scenario involves a New York resident, convicted in New York and arrested by immigration officials at the probation office, transferred to a county jail in New Jersey, where he may or may not see an immigration judge for a bond hearing, and finally transferred to Oakdale. Family members in New York are likely to contact New York attorneys and advocates on his behalf, while the non-citizen himself may speak with an attorney in New Jersey before proceedings finally commence in Louisiana. Due to the split among the circuits, any legal advice he or his family receives becomes useless as soon as he is transferred to a facility in another circuit.

DHS detains many non-citizens whose lives are affected by the application of the aggravated felony label to drug possession misdemeanor convictions. DHS detains these non-citizens for a number of different reasons. DHS takes the position that any non-citizen who has spent one day or more in jail since 1998 on a drug conviction is subject to mandatory detention.[6] Furthermore, DHS may detain a non-citizen U.S. resident who travels outside the country upon her attempted return to the United States if she is found inadmissible as a result of a prior conviction. A non-citizen may also be detained due to a prior conviction if he or she comes to the attention of DHS through an application for a new immigration status, such as naturalization. Lastly, non-citizens seeking asylum in the United States may be subject to detention while their asylum applications are processed.

As detention plays a growing role in immigration enforcement, the lack of predictability within the law becomes increasingly troubling. The numbers of non-citizens detained through these different routes has risen steadily in the past ten years. From 1996

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[6] *In re Adeniji*, 22 I. & N. Dec. 1102, 1107–11 (BIA 1999).

to 2004, the size of the daily population in DHS detention facilities increased by more than 150%, from 9,011 in 1996 to 22,812 in 2004.[7] Over the course of a given year, hundreds of thousands of non-citizens will be detained. In 2002, DHS detained approximately 202,000 non-citizens. Of this number, DHS asserts approximately 103,000 had criminal records.[8] As a result of the split among the circuits, each of these non-citizens is unable to predict the devastating immigration consequences that could follow from a misdemeanor conviction, because those consequences depend entirely on where the non-citizen is detained.

II. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE IT CONCERNS THE APPLICATION OF IMMIGRATION LAW'S MOST SEVERE PENALTIES

Virtually every non-citizen convicted of a drug offense is deportable.[9] Congress has chosen to lessen the dramatic impact of

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[7] ALISON SISKIN, CONGRESSIONAL RESEARCH SERVICES, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 12 (2004), *available at* http://www.fas.org/irp/crs/RL32369.pdf. DHS' Bureau of Immigration and Customs Enforcement (ICE) operates eight detention facilities around the country, and augments the capacity of its own detention facilities with an additional seven contract detention facilities. ICE also uses state and local jails on a reimbursable basis, joint federal facilities with the Bureau of Prisons, the Federal Detention Center in Oakdale, Louisiana, and a contractor owned and operated facility in Eloy, Arizona. U.S. ICE Office of Detention and Removal (DRO), http://www.ice.gov/graphics/dro/ (last visited Nov. 9, 2005).

[8] SISKIN, *supra* note 7, at 12.

[9] 8 U.S.C. § 1227(a)(2)(B) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

this law by allowing immigration judges to find that certain non-citizens are eligible for cancellation of removal, asylum, or a family hardship waiver if they can prove sufficient positive equities or threat of persecution upon removal. The aggravated felony determination acts as a per se bar to these forms of relief, preventing immigration judges from granting relief even for those non-citizens whose continued presence here would benefit the United States. As a function of the circuit split, the profoundly life-altering consequences of the aggravated felony label are applied inconsistently throughout the country.

A non-citizen convicted of a crime deemed an aggravated felony may find herself unable to obtain any relief from removal, no matter how compelling her circumstances. As a result of the current split among the circuits, two non-citizens convicted of the same crime in the same state may face dramatically different immigration consequences. The application of the aggravated felony label to immigrants with misdemeanor drug possession convictions means that non-citizens who served in the Armed Forces, and have U.S. citizen family members, will be exiled from the United States without regard for the hardship caused to themselves or their families. Furthermore, non-citizens who could otherwise naturalize may be permanently barred from U.S. citizenship as a result of misdemeanor drug possession convictions. Other non-citizens, even those convicted of the same misdemeanor offense in the same state, will be eligible for relief from removal, asylum, or citizenship solely because they happen to be detained or are required to make their application in another circuit.

A. An Aggravated Felony Conviction Bars An Immigration Judge From Exercising Discretionary Authority To Permit A Non-Citizen To Remain In The United States

Because Congress has long recognized that removal has dramatic and devastating consequences for non-citizens and their families, the Immigration and Nationality Act contains several provisions that empower judges to grant discretionary relief from removal to otherwise deportable or inadmissible non-citizens based on their individual circumstances. Non-citizens with misdemeanor drug possession convictions, including lawful permanent residents who have lived in the United States for many years, will be ineligible for almost all of these forms of relief if they appear before an immigration judge in a jurisdiction where their offense is considered an aggravated felony.

Lawful permanent residents who are deportable are eligible for cancellation of removal if they have been lawfully admitted as permanent residents for at least five years and have spent seven continuous years in the United States. 8 U.S.C. § 1229b(a). Receipt of cancellation of removal depends upon the non-citizen's ability to show compelling reasons why she should be permitted to remain in the United States. Cancellation of removal has traditionally been an important form of relief for lawful permanent residents who have lived in the United States for most of their lives and lack meaningful ties to their home country, who have served in the U.S. Armed Forces, whose families would suffer if they were deported, or who can show proof of rehabilitation and good character.

Family hardship waivers are an important form of relief for lawful permanent residents who are otherwise inadmissible. In order to qualify for relief under this provision, a lawful permanent resident must show seven years of continuous residence in the

United States and that denial of admission would result in extreme hardship to a spouse, parent or child who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1182(h).

Lawful permanent residents are statutorily barred from obtaining cancellation of removal or a family hardship waiver if they have been convicted of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3); 8 U.S.C. § 1182(h). Application of the aggravated felony label to a misdemeanor drug possession offense therefore prohibits an immigration judge from considering even the most compelling individual circumstances and requires the removal of individuals who would otherwise qualify for the relief that Congress has made available.[10]

B. An Aggravated Felony Conviction Bars An Immigration Judge From Granting Asylum To A Non-Citizen Who Has Suffered Or Will Suffer Persecution In Her Country Of Origin

Individuals who have suffered past persecution or who face a well-founded fear of future persecution in their home countries are eligible for asylum in the United States. For immigrants who cannot return to their countries of origin, asylum is a route to permanent residency and eventually U.S. citizenship. Immigrants who have been convicted of a "particularly serious crime,"

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[10] A non-citizen with an aggravated felony conviction is also ineligible for voluntary departure in lieu of an order of removal. *See* 8 U.S.C. § 1229c(b)(1)(C). This form of discretionary relief allows a non-citizen to avoid the stigma and harassment of removal proceedings, and permits her to leave within a designated period of time, giving her an opportunity to tie up her affairs in the United States before departure. Voluntary departure also allows a non-citizen to choose to return to a country other than her country of origin in order to avoid persecution.

however, are statutorily barred from eligibility for asylum, and such forms of relief may even be revoked based on their convictions. 8 U.S.C. § 1158(b)(2)(A)(ii) & (c)(2)(B). An individual convicted of an "aggravated felony" is automatically deemed to have been convicted of a "particularly serious crime," and therefore is statutorily barred from obtaining asylum. 8 U.S.C. § 1158(b)(2)(B)(i). An immigration judge presiding over such a case lacks any discretion whatsoever to grant asylum, regardless of how great the danger of persecution the non-citizen would face if returned to her home country.

C. An Aggravated Felony Conviction May Bar An Otherwise Eligible Non-Citizen From Naturalization

In order to naturalize and become a U.S. citizen, a non-citizen ordinarily must establish, among other things, that she has been a person of "good moral character" within the past five years before applying to naturalize, and that she has continued to exhibit good moral character while the naturalization application is pending. 8 U.S.C. § 1427(a). In contrast, a non-citizen convicted of an aggravated felony after 1990 is permanently barred from naturalization because the Immigration and Nationality Act precludes any such individual from establishing good moral character. 8 U.S.C. § 1101(f)(8).

III. Resolution Of The Split Among The Circuits Is Warranted Because The Aggravated Felony Label In Some Circuits Applies To Low-Level Misdemeanor Convictions, Many Of Which Were Adjudicated In A Summary Fashion Without Any Contemplation That Serious Consequences Would Attach To The Disposition

The Fifth Circuit's *Sanchez-Villalobos* decision, which states that even a misdemeanor drug possession offense could be deemed an aggravated felony, illustrates the broad sweep of the "either state or federal felony" offense approach to the aggravated felony label. This broad application leads to far harsher consequences than those contemplated by misdemeanor defendants and their representatives at the time of conviction.

The New York criminal justice system demonstrates how the rule endorsed by the Fifth Circuit in this case threatens non-citizen defendants with consequences far greater than can possibly be justified by the procedural protections they received in the criminal justice system. The New York example is particularly relevant because non-citizens with New York misdemeanor convictions are regularly detained and placed in removal proceedings in other jurisdictions, including the Fifth Circuit. These New Yorkers face dramatic immigration consequences despite New York State's minimal procedural protections for misdemeanor defendants.

In New York State, defendants facing misdemeanor convictions are processed at a rate that reflects the minimal consequences the state expects to follow such convictions. A New York State misdemeanor drug possession conviction rarely results in incarceration. For example, there were 258,655 convictions for Criminal Possession of a Controlled Substance in the Seventh Degree, a misdemeanor under New York law, between 1995 and 2004. Of this number, almost sixty percent resulted in

sentences of time served, probation only, conditional discharge, or fines. Of the remainder, the median length of sentence imposed was between nineteen and twenty days.[11]

New York's quality of life policing campaign has had a tremendous impact on the number of misdemeanor drug cases heard in its criminal courts.[12] In 1994, for example, there were 56,256 misdemeanor drug arrests in New York State.[13] By 2001, the number of misdemeanor drug arrests had reached 363,269, as compared to 169,944 felony drug arrests.[14] In New York City, quality of life policing led to a sixty percent increase in misdemeanor arraignments in the City's Criminal Courts between 1992 and 2002.[15] The sheer number of misdemeanors processed in

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[11] NEW YORK STATE DEFENDERS ASSOC., ANALYSIS OF NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES MISDEMEANOR DRUG OFFENSE STATISTICS FOR THE YEARS 1995 THROUGH 2004 (2005), http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/05_Analysis_NY_misde-meanor_drug_offense_data_10_05.pdf. A person is guilty of criminal possession of a controlled substance in the seventh degree when he knowingly and unlawfully possesses a controlled substance. N.Y. Penal Law § 220.03 (2005).

[12] *See* HON. JUDITH S. KAYE, THE STATE OF THE JUDICIARY 2004, at 7 (2004), http://www.courts.state.ny.us/ctapps/soj04.pdf.

[13] New York State Div. of Criminal Justice Servs., Adult Arrests: N.Y. State by County and Region 1994, http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year1994.htm (last modified July 21, 2005).

[14] OFFICE OF NATIONAL DRUG CONTROL POLICY, STATE OF NEW YORK PROFILE OF DRUG INDICATORS 5 (April 2003).

[15] Martha Rayner, *New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1026 (2004).

New York State criminal courts requires attorneys and judges to prioritize speed and efficiency.

Most misdemeanor offenses are processed extremely quickly and without substantial procedural protections, with the understanding that serious direct and collateral consequences will not follow from a conviction. Outside of New York City, misdemeanor cases may be heard by Town or Village justices or police court judges, many of whom are not lawyers.[16] In New York City, misdemeanors are prosecuted in Criminal Court, where defendants may find themselves arraigned before Civil Court judges, who are unfamiliar with criminal law and procedure.

Defendants facing misdemeanor charges can and often do plead guilty at arraignment, and many have their cases arraigned, pled, and sentenced on the same day.[17] In New York City in 1998, seventy-three percent of non-felony Criminal Court arraignments resulted in a determinative outcome.[18] Because every judge in New York Criminal Court handles, on average, more than 5,000 cases per year, judges can often spend only minutes per case.[19] Likewise, neither the defense nor the prosecution has the time to investigate the merits of each case. In New York City, indigent

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[16] New York Judicial Selection, http://www.ajs.org/js/NY_methods.htm (last visited Nov. 9, 2005).

[17] *See* N.Y. STATE BAR ASS'N, THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES 17–18 (2001).

[18] FREDA F. SOLOMON, N.Y. CRIM. JUST. AGENCY, INC., THE IMPACT OF QUALITY OF LIFE POLICING: HOW THE NYPD'S NEW POLICING STRATEGY OF THE 1990S AFFECTED ARRESTS, DEFENDANTS AND THE CRIMINAL COURTS 5 (2003). A determinative outcome includes dismissal of charges.

[19] Daniel Wise, *Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics Investigation*, N.Y. L.J., May 22, 2000, at 1.

defendants may speak to a defense attorney for the first time only minutes before arraignment. This situation is not limited to New York City, however. A 2003 survey by the NAACP Legal Defense and Education Fund found that many misdemeanor defendants in Schuyler County, New York, accept guilty pleas without ever speaking to a lawyer.[20]

As is true throughout the country, the New York State court system has come to rely heavily on plea bargaining to decrease the administrative burden of trying an ever-increasing number of defendants. Given the enormous volume of misdemeanor cases heard in Criminal Court, prosecutors, defense attorneys, judges and defendants alike are under enormous pressure to reach a plea agreement at arraignment. If no plea agreement is reached, misdemeanor cases join a massive backlog of similar cases. The Honorable Judith S. Kaye, Chief Judge of the State of New York, noted in her 2004 State of the Judiciary report that "tens of thousands of misdemeanor cases remain pending for months, even years, while felony filings decline."[21] Low-income defendants feel intense pressure to plead guilty at arraignment because proceeding with their cases means their cases will drag on for significant periods of time, forcing them to attend numerous court appearances which interfere with work and family obligations.[22]

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20 NAACP LEGAL DEF. AND EDUC. FUND, THE STATUS OF INDIGENT DEFENSE IN SCHUYLER COUNTY 10–11 (2003).

21 KAYE, *supra* at 7.

22 Rayner, *supra* note 15, at 1055 ("[T]he duty of many court appearances results in pressure on defendants to plead guilty to end the court appearances.").

The pervasiveness of plea bargaining was noted over twenty years ago by the Association of the Bar of the City of New York, which stated, "If you tell people that several months went by recently in Brooklyn Criminal Court without a single person being tried for anything they will tell you, quite correctly, that you are talking about something which is not a court."[23] At that time, only one-half of one percent of misdemeanor cases went to trial.[24] The situation has only gotten worse: in 2003, the New York City misdemeanor trial rate was less than one third of one percent.[25]

New York State is not alone in processing misdemeanor drug possession offenses rapidly, primarily through plea bargains, and without substantial procedural protections. As a result of the current confusion among the circuits as to the appropriate application of the aggravated felony label, non-citizens with state-level misdemeanor drug possession convictions will face consequences far more serious than are merited by the perfunctory treatment their cases receive.

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[23] CRIMINAL COURTS COMM. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., SAVING THE CRIMINAL COURT: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 19 (1983).

[24] *Id.* at 3.

[25] Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 321 n.35 (2005) (citing statistics from the New York State Division of Criminal Justice Services, Bureau of Justice Research and Innovation).

IV. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE SPLIT UNDERMINES THE RULE OF LAW BY INTERFERING WITH THE ABILITY OF IMMIGRANTS TO MAKE DECISIONS CONCERNING THE RESOLUTION OF MINOR CRIMINAL CHARGES THAT MAY HAVE PROFOUND IMMIGRATION CONSEQUENCES

The circuit split, coupled with DHS detention transfer policies, makes it extremely difficult to predict what consequences will follow from a guilty plea or a decision to go to trial. As a result of the split, a non-citizen convicted of a misdemeanor drug possession offense may be subject to drastically different consequences depending solely upon where she is detained. Without uniformity in the interpretation of the term "aggravated felony," stability and predictability within the legal system become elusive concepts to non-citizens and advocates struggling to make informed choices at the intersection of immigration and criminal law.

Amici are organizations that serve defense attorneys whose clients could face removal and other severe immigration consequences as a result of a criminal disposition by guilty plea or trial conviction. In order to properly counsel immigrant clients about the relative advantages and disadvantages of taking a plea, criminal defense attorneys must be fully informed about the implications that a conviction may have for the non-citizen's immigration status. Part of amici's mission is to train attorneys to give sound legal advice to their clients, including non-citizen clients. The split among the circuits makes it very difficult for amici to carry out this task because there is no guarantee that non-citizens will face removal proceedings in the same jurisdiction where they reside or are convicted of a crime.

Attorneys serving indigent defendants, the prosecutors who try their cases, and the judges who hear them all carry massive caseloads. The over-burdened criminal court system usually

depends on all but a handful of cases being disposed of through plea bargains. Advocates may have only minutes to talk to their clients before a hearing at which a plea can be taken; it is essential for attorneys to have clear rules to govern the advice they provide, especially when the potential immigration consequences far outweigh the penal consequences.

The specific experience of amicus IDP further illustrates how the current split in the circuits interferes with efforts to provide sound legal advice to immigrants in the criminal justice system. Part of IDP's mission is to provide information to immigrant defendants and their attorneys in order to assist them in making decisions that may have drastic immigration consequences. IDP runs a hotline that receives more than 1,000 calls per year from immigrants and advocates. Many of these calls involve questions about the potential consequences of a guilty plea in misdemeanor cases. This decision presents a minefield of potential problems for those immigrants if their convictions are considered "aggravated felonies." Given the current split among the circuits in interpreting the term, however, IDP struggles to advise such callers, because it cannot predict what law might apply to their case.

Amici serve non-citizens with past convictions as well as non-citizen defendants facing pending criminal charges. These individuals seek advice regarding a host of immigration-related decisions. For example, they often seek advice about whether or not to file for naturalization, whether or not to leave the country in order to visit family elsewhere, and whether or not to apply for a replacement green card. A lawful permanent resident with U.S. citizen children and a U.S. citizen spouse may call seeking advice about whether or not she should leave the country in order to visit a dying parent. If she has a past misdemeanor drug possession conviction, she could be deemed inadmissible upon her return. If placed in detention upon her attempted return to the United States, she might be transferred to any detention facility in the country,

and it is impossible to know whether her drug possession conviction will render her ineligible for the discretionary relief from removal that her compelling circumstances might otherwise afford her. A stable and uniform definition of the term "aggravated felony" is necessary for defense attorneys and immigrant advocates to advise immigrants who are making decisions that could have life-altering consequences for themselves and their families.

CONCLUSION

For the foregoing reasons, amici respectfully submits that the petition for the writ of certiorari should be granted.

Dated: November 11, 2005
New York, NY

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Supreme Court of the United States

ALBERTO SANCHEZ VILLALOBOS,
A/K/A ALBERTO VILLALOBOS SANCHEZ,
A/K/A FRANCISCO SANCHEZ SAENZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This case presents the question whether a state-law conviction—here, misdemeanor possession of codeine, for which Petitioner was sentenced to 60 days—is a "drug trafficking" crime and, therefore, an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B).

The Government does not dispute that there is a conflict within the courts of appeals on this question, nor could it. To the contrary, the Government signals that this issue is in need of the Court's resolution. Opp. 8-9 n.4.

In fact, and as the petition explained, there are deep and growing conflicts within the courts of appeals on this and related questions. On the threshold issue—the methodology for determining whether a state-law conviction is a "drug trafficking" crime and, therefore, an "aggravated felony"—the courts of appeals are divided between two competing approaches. Indeed, there are growing splits *within* each of those approaches. The present case provides this Court an ideal opportunity to resolve the confusion in the courts of appeals on these important and recurring questions.

The Government's arguments for denial of the writ are without merit. Although the Government suggests that this case presents a poor vehicle because it arises in the sentencing (rather than immigration) context, the Government's argument is directly contrary to the position that it has repeatedly taken in the courts of appeals. For similar reasons, the guidance of *Braxton* v. *United States*, 500 U.S. 344 (1991), is inapplicable. And the Government's suggestion that the case is moot (Opp. 5-8) is flatly contradicted by controlling Supreme Court precedent. *See United States* v. *Campos-Serrano*, 404 U.S. 293, 294 n.2 (1971).

1. This case turns on the meaning of a provision of the United States Code, § 1101(a)(43)(B) of Title 8, which defines what constitutes a drug trafficking crime and, therefore, an aggravated felony. The term "aggravated felony" is controlling in two different contexts; in both contexts the definition in § 1101(a)(43) controls. First, the determination that an individual has been convicted of an "aggravated felony" carries a number of consequences under the federal immigra-

tion laws. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii) (alien who has been convicted of an "aggravated felony" as defined in § 1101(a)(43) is removable). Second, a person who is convicted of an "aggravated felony" is subject to increased punishment for criminal illegal reentry. In particular, the illegal reentry statute, 8 U.S.C. § 1326(b)(2), increases the statutory maximum (from two to twenty years) for an alien who has previously been convicted of an "aggravated felony," *see generally Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (considering whether conviction of an "aggravated felony" under § 1326(b)(2) is an element of the offense); the statute is clear that, for purposes of the illegal reentry statute, "aggravated felony" is defined by § 1101(a)(43). *See* 8 U.S.C. § 1101(a) (definitions of § 1101(a)(1)-(50) are "for purposes of this chapter [12]," which includes § 1326). In exactly the same manner, the illegal reentry sentencing provision creates a sentencing enhancement for an alien who has previously been convicted of an "aggravated felony" and, paralleling the statute, expressly states that aggravated felony shall have the same meaning as in § 1101(a)(43). USSG 2L1.2 & Application Note 3 (the term "aggravated felony" in USSG 2L1.2(b)(1)(C) "has the meaning given that term in 8 U.S.C. § 1101(a)(43)").

In both the immigration and sentencing contexts, therefore, the question presented is one and the same: whether a particular offense falls within the scope of § 1101(a)(43)(B). The Government, however, attempts to minimize the divisions among the circuits by walling off the two contexts and discussing only those decisions that, like the one below, arise under the sentencing laws. *See* Opp. 11 ("The variations in the approaches taken by courts of appeals that petitioner identifies are not sufficiently substantial *in the Sentencing Guidelines context* . . . to warrant this Court's review." (emphasis added)); Opp. 11-13 & n.6 (limiting discussion to sentencing context). The Government even suggests that § 1101(a)(43)(B) might carry a *different* meaning depending on the context in which it is used. Opp. 8 n.4 ("A number of courts have recognized that the definition of 'aggravated fel-

ony' for criminal sentencing purposes may differ from the definition employed . . . in immigration proceedings.").

This approach is directly contrary to the position that the Government has taken in the courts of appeals. In those cases, the Government has repeatedly argued that the meaning of § 1101(a)(43)(B) is the *same* in both the immigration and sentencing contexts. Indeed, it has stated that there is no tenable argument to the contrary. As the Government stated forcefully in a brief filed in the Second Circuit less than three weeks ago: "There is no basis for treating the definition of 'aggravated felony' differently based on whether it is used in the immigration or criminal sentencing context." Brief for Respondents, *Martinez* v. *Ridge*, No. 05-3189, at 22 (2d Cir. Dec. 7, 2005);[1] *see also* Brief for Respondent, *Cazarez-Gutierrez* v. *Ashcroft*, No. 02-72978, 2003 WL 22752434, at *18 (9th Cir. June 9, 2003) ("In both the sentencing and immigration contexts . . . the very same statutory provision governs. . . . To say that a given statute has inconsistent meanings when applied in different contexts is untenable."); Brief for the United States, *United States* v. *Hernandez-Avalos*, No. 00-50186, 2000 WL 33980051, at *13 (5th Cir. Oct. 9, 2000) ("[T]here is no viable distinction between the sentencing guidelines and the Immigration and Nationality Act for purposes of interpreting the definitions of 'aggravated felony' and 'drug trafficking crime.'").

In Petitioner's view—and apparently, the Government's as well—§ 1101(a)(43)(B) has a single meaning, and resolving its meaning in the present case would decide the issue in the immigration context as well. *Cf. Clark* v. *Martinez*, 125 S. Ct. 716, 722-723 (2005) ("To give the[] same words a different meaning for each category would be to invent a statute rather than interpret one.").

2. For the same reasons, the Government is plainly incorrect in contending (Opp. 9) that this case "solely concerns

[1] For the Court's convenience, Petitioner has sought permission to lodge the Government's brief in *Martinez* with the Clerk of the Court.

the court's interpretation and application of the Sentencing Guidelines." Just as in the immigration context, this case turns entirely on the meaning of a federal *statute*, § 1101(a)(43)(B).

Accordingly, the principle of *Braxton* v. *United States*, 500 U.S. 344 (1991), is inapposite. In that case, the Court set forth a discretionary principle that cautions "restrain[t] and circumspect[ion] in using [the] certiorari power as the primary means" of resolving inter-circuit conflict about the meaning of sentencing provisions. *Id.* at 348. Such restraint, however, is misplaced and improper where, as here, the conflict among the circuit courts concerns the proper construction of a federal statutory provision. *See Neal* v. *United States*, 516 U.S. 284, 290, 295 (1996) (noting that interpretation of a federal statute is the province of the federal courts, not the Sentencing Commission; resolving meaning of statute in case involving guidelines provision).

That the outcome of this case depends on the meaning of § 1101(a)(43)(B) is plain from an examination of the approach employed both by the court below and by the other circuits to have addressed this issue. After explaining that under the commentary to USSG 2L1.2, "'aggravated felony' has the meaning given that term in [§ 1101(a)(43)]," the Fifth Circuit proceeded to examine the text of, and precedents interpreting, § 1101(a)(43)(B) and related statutes. Pet. App. 3a-7a. This analytical approach is typical of the cases addressing this guidelines provision. *See, e.g.*, *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 902-905 (9th Cir. 2002) (stating that "'[a]ggravated felony' is a term of art created by Congress" and surveying immigration and sentencing cases to determine meaning of § 1101(a)(43)(B); "The crucial issue, therefore, is whether the convictions are 'felonies' as that term is used in the federal statutes at issue here."); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-146 & n.1 (2d Cir. 1999) (noting that Sentencing Commission "conform[ed]" the term "aggravated felony" in USSG 2L1.2 to the "definition in the Immigration and Nationality Act," and

therefore construing "the statutory definition of aggravated felony" in § 1101(a)(43)(B)).[2]

Indeed, as a litigant in the courts of appeals, the Government itself consistently treats this issue as an interpretation of the federal statutes referenced in the guidelines provision. *See, e.g.*, Brief for Appellees, *United States* v. *Wilson*, No. 02-4202, 2002 WL 32728386, at *24 (4th Cir. June 17, 2002) (noting 2L1.2 commentary that "'aggravated felony' has the meaning given that term in [§ 1101(a)(43)]"; "Thus, it is that statute which the Court must construe.").

3. The Government does not dispute the existence of significant conflicts in the courts of appeals; nor does it argue that Petitioner has mischaracterized any of these conflicts. Rather, and somewhat surprisingly, the Government argues that this case does not *implicate* these splits. Specifically, the Government argues that, under the facts of this case—involving a misdemeanor conviction for possession of codeine—no court of appeals would have held that Petitioner's conviction was *not* an aggravated felony. Opp. 11.

This is simply incorrect. The Government can advance this assertion only by ignoring interpretations of § 1101(a)(43)(B) in the *immigration* context, *see supra* p. 2, or by attempting to predict how the circuit courts might decide open questions of law in the future. Indeed, a careful examination of existing law indicates that Petitioner would have prevailed in at least five circuits. Petitioner would have prevailed in the Third and Sixth Circuits—the two circuits that look only to whether the conduct would be a felony under federal law (Pet. 8-10)—as it is undisputed that Petitioner's codeine possession would not have constituted a fel-

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[2] *See also United States* v. *Amaya-Portillo*, 423 F.3d 427, 430-435 (4th Cir. 2005) (stating that construing 2L1.2(b)(1)(C) "entails the interpretation of a statute"; construing § 1101(a)(43)(B) and related statutes); *United States* v. *Palacios-Suarez*, 418 F.3d 692, 695-699 (6th Cir. 2005) (in sentencing case, engaging in extensive analysis of plain language and legislative history of § 1101(a)(43)(B) and related statutes).

ony under federal law.[3] And Petitioner would have also prevailed in the Fourth, Tenth, and Eleventh Circuits, as these circuits rely on the *state classification* of the offense (Pet. 14); as such, Petitioner's state-law "misdemeanor" conviction would not have been deemed a "felony" in these circuits.[4]

4. In fact, this case presents an ideal vehicle, because it would permit the Court to decide not only the threshold conflict, but two subsidiary conflicts that have also divided the courts of appeals.

As the petition explained (Pet. 8-11), the courts of appeals are divided (6-2-2) on the threshold question whether a state-law conviction is a "drug trafficking" crime and, therefore, an "aggravated felony" under § 1101(a)(43)(B). Six courts of appeals have adopted one methodology, two have adopted another, and two others have added to the confusion by adopting *different* approaches depending on the context.

Within each of these approaches, there are deep and growing splits. First, there is a 4-2 conflict in the courts of appeals regarding whether, using a recidivist enhancement, the Government can "add" two state-law convictions (here,

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[3] Nor would his prior conviction have turned his misdemeanor into a felony in these circuits: the Third Circuit has held that recidivist enhancements may not be considered unless certain procedures are followed, *Steele* v. *Blackman*, 236 F.3d 130, 137-138 (3d Cir. 2001), and the Sixth Circuit has not squarely addressed this issue, *Palacios-Suarez*, 418 F.3d at 700 (stating in dicta that state drug offense "could be a federal felony" under recidivist provision but not deciding the issue). The Government ignores the Third Circuit decision (because it is in the immigration context) and takes the Sixth Circuit's dicta in *Palacios-Suarez* as a holding. Opp. 12, 13 n.6.

[4] These circuits have not decided the recidivist-enhancement issue (*i.e.*, whether the federal recidivist provision may turn two misdemeanors into a "felony") and, as a result, would not have concluded under current law that Petitioner's conviction was a felony under federal law. The Government acknowledges that Petitioner might have prevailed in the Fourth Circuit (Opp. 12 n.5), relies on an unpublished Tenth Circuit case in a different context (Opp. 12 (citing *United States* v. *Miramontes-Lamas*, No. 97-4130, 1998 WL 50955, at *1 (10th Cir. Feb. 9, 1998) (applying a *state-law* recidivist provision))), and completely ignores the Eleventh Circuit.

two state-law misdemeanors) to create a federal "felony." Pet. 11-13. It is our view that, taken together, *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Taylor* v. *United States*, 495 U.S. 575 (1990), dictate that this is impermissible. Pet. 16-18.[5] Moreover, in light of developments since *Almendarez-Torres*, the Court could decide that principles of constitutional avoidance require that Petitioner's prior state-law misdemeanor conviction may not be used to convert his second misdemeanor into a federal felony. *Cf. Jones* v. *United States*, 526 U.S. 227, 251-252 (1999). In any event, regardless of the ultimate resolution of the question, this conflict is in need of the Court's resolution.

Second, for those circuits that look to whether a crime would be a felony under state law, the courts of appeals are divided (6-2) regarding whether the state's classification of the offense (*i.e.*, "misdemeanor" or "felony") or the maximum length of imprisonment under state law (*i.e.*, whether more than one year) should control. Pet. 13-14.

The present case would permit the Court to consider all three of these conflicts. *Cf.* Petition for Writ of Certiorari, *Lopez* v. *Gonzales*, No. 05-547, at i (filed Oct. 31, 2005) (in case involving single state-law felony that carried maximum punishment of ten years, presenting only the threshold question of methodology for determining whether a state-law conviction is an aggravated felony). It would also permit the Court to consider these questions during the current Term, and in the context of a state-law misdemeanor.

5. Finally, although the Government spends many pages *implying* that the case may be moot (Opp. 5-8), the Government never in fact states that this is so. The reason for this is simple: this Court has already decided the mootness question in Petitioner's favor in *United States* v. *Cam-*

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[5] The Government's only response (Opp. 13-14) is to read these two cases in isolation. The Government does not address any of Petitioner's arguments relating to the other two Questions Presented. *See* Pet. 14-16, 18-19.

pos-Serrano, 404 U.S. 293 (1971), a case that is factually indistinguishable from this one.

In *Campos*, the defendant, an undocumented alien, received a suspended sentence and three years probation. The court imposed one—and only one—condition of probation: that he "not return to the United States illegally." App. 5a.[6] The defendant was then deported to Mexico.

This Court had little difficulty concluding that the case presented a live controversy under Article III:

> The sentence was suspended, and the respondent was placed on probation for three years "on condition that he return to Mexico and not return to the United States illegally." Pursuant to this sentence, he was remanded to the custody of the Immigration and Naturalization Service for deportation under a previous order. It appears that he is now in Mexico. *Clearly, the fact that the respondent is now out of the country does not render this case moot. He is still under the sentence of the District Court and on probation subject to conditions imposed by the District Court.* Should he violate those conditions, he will be subject to imprisonment under his continuing criminal sentence.

Campos, 404 U.S. at 294 n.2 (emphasis added). Thus, even though the defendant had been deported and was subject only to the condition that he not return illegally, the Court stated that there was a live controversy because "he is living under those restraints today." *Id.*

Because Petitioner in the present case is under a term of supervised release that includes the same condition as in *Campos*, the holding of *Campos* controls the mootness inquiry here. In fact, Petitioner's case presents a more signifi-

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[6] For the Court's convenience, excerpts from the Appendix in *Campos* are included as an Appendix to this Reply; Petitioner has sought permission to lodge the complete *Campos* Appendix with the Clerk of the Court.

cant controversy than *Campos* itself. Here, in addition to the prohibition against returning, Petitioner was ordered by the district court to comply with a list of *additional* conditions, many of which place limitations on lawful activity. *E.g.*, Pet. App. 15a (restriction on aicohol consumption); *id.* (restriction on association). Indeed, the district court's order specifically ordered Petitioner to comply with the various conditions of supervised release even after his removal. *Id.* at 31a (*"While you're on supervised*[] *release*, Mr. Sanchez, you are not to return to the United States .... *You are to* .. . *obey all the other standard terms and conditions adopted by this Court.*" (emphasis added)); *Id.* at 13a-17a (listing conditions of Petitioner's supervised release).[7]

The Government makes only a weak attempt to distinguish *Campos*, pointing out that the *Government* sought review in *Campos*. Opp. 7. We know of no Article III doctrine that conditions the existence of a "case or controversy" on which party is seeking review, nor does the Government cite any case for this novel proposition. In addition, the Government argues that *Campos* is distinguishable because reversal "could have led to extradition of the defendant[]." *Id.* Not only does this rationale not appear anywhere in *Campos* (or the *Campos* briefs or oral argument), it fails to distinguish this case: in light of the near identical facts, if the possibility of extradition was sufficient to present a live controversy in *Campos*, the same is true here.[8]

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[7] *See also United States* v. *Williams*, 369 F.3d 250, 253 (3d Cir. 2004) (18 U.S.C. § 3583 provides a "'clear indication that a term of supervised release remains in effect after the defendant is deported'" (citation omitted)); *United States* v. *Ramirez-Sanchez*, 338 F.3d 977, 980 (9th Cir. 2003) ("A defendant's deportation does not extinguish supervised release."); *United States* v. *Akinyemi*, 108 F.3d 777, 779-780 (7th Cir. 1997) (holding that deportation does not extinguish supervised release); *United States* v. *Brown*, 54 F.3d 234, 238 (5th Cir. 1995) (same).

[8] The Government incorrectly attempts to invoke cases involving the "collateral consequences" doctrine with respect to Petitioner's supervised release. Opp. 5-8 (citing *Spencer* v. *Kemna*, 523 U.S. 1 (1998), and *Lane* v. *Williams*, 455 U.S. 624 (1982)). The "collateral consequences" doctrine,

Even apart from Petitioner's ongoing supervised release, the *immigration* "collateral consequences" furnish an independent reason why this case is not moot. *See United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983). Among other consequences, an aggravated felony conviction impacts an individual's ability to obtain a temporary non-immigrant visa under 8 U.S.C. § 1182(d)(3). Indeed, the Second Circuit recently held that this precise collateral consequence was sufficient to present a live controversy. *United States* v. *Hamdi*, No. 03-1307, _ F.3d _, 2005 WL 3366948, at *2-4 (2d Cir. Dec. 12, 2005) (case presented live controversy, notwithstanding completion of sentence and subsequent deportation, because of the impact on whether visa under § 1182(d)(3) would be granted); *see also In re David Michael Labadie*, 2004 WL 848422 (BIA Feb. 27, 2004) (aggravated felony conviction given significant weight in determining whether § 1182(d)(3) visa should be granted).

CONCLUSION

The petition for a writ of certiorari should be granted.

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however, seeks to ascertain the likelihood of *future* collateral consequences (such as the ability to vote or get a job) resulting from a conviction or sentence. *See Spencer*, 523 U.S. at 8. Petitioner does not rely on these cases with respect to his supervised release, as he is *currently* subject to conditions ordered by the district court. *See, e.g., Jago* v. *Van Curen*, 454 U.S. 14, 21 n.3 (1981) (case not moot where respondent released on parole); *Campos*, 404 U.S. at 294 n.2 (live controversy where defendant "on probation subject to conditions imposed by the District Court"); *see also* 18 U.S.C. § 3583(d)(2) (describing supervised release conditions as "deprivation of liberty"); *Reno* v. *Koray*, 515 U.S. 50, 59 (1995) (describing supervised release as a "restriction on liberty").

The Government also suggests (Opp. 6) that a decision in Petitioner's favor would not redress his injury. That is incorrect. Due to the erroneous sentencing enhancement, Petitioner was sentenced to more than one year in prison, thereby triggering a *mandatory* one-year term of supervised release. *See* USSG 5D1.1(a). Absent this enhancement, Petitioner would have been sentenced to only one to seven months in prison, and would not have been subject to the mandatory one-year term. *Id.*; *see also* Pet. App. 20a (offense level of five without eight-level enhancement); U.S. Sentencing Comm'n, Federal Sentencing Guidelines Manual Ch. 5, Pt. A (Nov. 2003) (Category III) (range of one to seven months).

Respectfully submitted,

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DECEMBER 2005

APPENDIX

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-46

UNITED STATES OF AMERICA,

Petitioner,

v.

DIMAS CAMPOS-SERRANO

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 30, 1970
CERTIORARI GRANTED MARCH 1, 1971

APPENDIX

[STAMP: FILED APR 15, 1971]

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* * *

The COURT. There will be a finding of guilty. Judgment will be entered upon that verdict of the Court.

Mr. Cleary, I am prepared to pass sentence. I don't believe there is any requirement for any presentence investigation here.

Mr. CLEARY. No, sir.

I would ask that the Government would disclose what was the disposition of the case involving Mr. Jose Rodriguez Ortiz, charged with a similar offense, merely for information of defense counsel and for the Court.

[41] The COURT. You mean for mitigation?

Mr. CLEARY. Yes, sir.

The COURT. To me.

Mr. MACKENZIE. Your Honor——

The COURT. You are required to do that as an officer of this court.

Mr. MACKENZIE. Mr. Ortiz pled guilty. I'm not certain of the date right now. It was in the early part of December—I believe around the 16th or 12th of December—and he was [115] placed on five years' probation, a condition of the probation being that he not reenter the United States illegally during that period or he would be sentenced—I'm not sure whether it was two years——

The COURT. Now, you have answered that question.

What do you have to say in this case?

Mr. CLEARY. At this time I would like to point out to your Honor that this defendant has absolutely no criminal

record whatsoever, that he merely manifested a desire to obtain work in this country, that he came up to this country and was living here, supporting his family back in Mexico.

The family back in Mexico consists of—I believe he has seven brothers and sisters. I am not exactly sure on [42] the exact amount, but he was sending money home, and that in this particular case there was evidenced merely a desire to come to a better country, and I think sometimes in this particular situation we have to consider what the defendant's background was.

The COURT. You mean a better country economically, not a better country. I don't think he would agree to the fact that this was a better country than Mexico.

Mr. CLEARY. Well, I think he would, your Honor.

The COURT. I doubt it.

Mr. CLEARY. In any event, I think that the question is that these [sic] are continually these types of cases. I personally felt, and I exhibited to the Court, that this was a matter for straight deportation, which would have been the normal situation, and only upon reentry would a man be subject to—

The COURT. This is a felony.

Mr. CLEARY. Criminal prosecution.

However, the felony arises out of the fact of this falsely made certificate, and I think that there are many here that [43] are under different devices. I think the purpose of the statute was directed more towards those who would submit false documents, birth certificates and other documents to gain entry into this country.

The COURT. It is in the statute—it is that the indictment says.

Mr. CLEARY. Well, I know, the government and I have differences as to the indictment.

The COURT. I assume you would have, but that is what the indictment charges and the Code provides that it is a felony—

[116] Mr. CLEARY. Well, your Honor, I can only—

The COURT. —punishable by five years in the penitentiary or a $2,000 fine or both.

Mr. CLEARY. I can only draw upon and ask for the discretion and generosity of the Court, because I think that although this man has gone through trial—

The COURT. He is entitled to a trial.

Mr. CLEARY. Yes, sir.

The COURT. There is no question about that, and he won't be penalized by the fact that he asked for a trial.

What do you have to say, Mr. District Attorney?

[44] Mr. MACKENZIE. Your Honor, the Government has no evidence to indicate that the defendant has any prior criminal record or any prior violation of the Immigration laws.

The Government would point out to your Honor the recurring problem to this country of aliens entering illegally, that this problem is of course compounded gravely by the use of fraudulent documents which are purchased or procured down in Mexico and are used to obtain entry into the United States illegally, as in the case of the defendant herein.

That is all, your Honor.

The COURT. Very well, I will recess the court for five minutes.

(A short recess was taken.)

The COURT. Let the record reflect that the defendant has been, through the interpreter, permitted to speak to this Court and he has related to the Court that he asks permission to go back to Mexico.

He knows that this is a felony, that I can send him to the penitentiary for five years and fine him $2,000—does he know that?

The DEFENDANT. (Through Interpreter) No, I [45] didn't know that.

The COURT. You are now advised be [sic] me, that that is true, and also by your counsel.

Mr. CLEARY. We have discussed the penalty before, your Honor.

The COURT. Yes.

Mr. CLEARY. He might not have known it at the time of the offense.

The COURT. All right.

Well, I will herewith remand him to the custody of the Attorney General for a period of three years, and I shall suspend [117] that sentence, placing him on probation for that time.

Now, you tell him that.

The DEFENDANT. (Through Interpreter) Yes.

The COURT. And if you reenter the United States I can impose the sentence. Tell him that.

The DEFENDANT. (Through Interpreter) Yes, I will never be back.

The COURT. The condition of that probation is that he better not return to the United States illegally.

The DEFENDANT. (Through Interpreter) Yes.

The COURT. And he will pay his own way back [46] to Mexico, Mr. Ferris.

Mr. District Attorney.

Mr. MACKENZIE. Your Honor, I would request at this time that the United States Marshal be directed to remand the defendant to the custody of the Immigration Service for deportation, pursuant to the deportation entered on November 22.

The COURT. It is so ordered.

Mr. CLEARY. Your Honor, at this time in this proceeding what I would like to do is file together and collectively a renewed motion for judgment of acquittal, motion for new trial and motion for arrest of judgment.

The COURT. Overruled.

Mr. CLEARY. At this time I would file with the Court a notice of appeal and a motion for leave to proceed in forma pauperis.

The COURT. Motion to appeal is denied as being frivolous. Motion to proceed in forma pauperis is denied. He is going back to Mexico.

Mr. CLEARY. Can I file the document with the Court, sir?

The COURT. You may file the document, but it [47] is denied. You can file it.

Anything further, Mr. Cleary?

You can file whatever documents you want.

Mr. CLEARY. No, sir, that takes care—

The COURT. But they are denied. He is fortunate in having you make the plea that you did make for him, and tell him I said so.

Mr. CLEARY. Thank you very much, your Honor.

One point though, your Honor. You made an aside to the reference that the defendant was to pay his own way back to Mexico.

[118] The COURT. He said that to the interpreter.

Mr. CLEARY. But I don't think he has the money.

The COURT. He told the interpreter that, didn't he, sir —Mr. Wimer?

Mr. WIMER. Yes, sir, and he will repeat it again just now—

Mr. CLEARY. Did you ask him how much money? If he had, I didn't know, so there's no misunderstanding.

Mr. WIMER. I didn't ask him that, because your Honor—

The COURT. You just forgot to get your fee.

This court stands in recess until 2:00 o'clock.

[48] Mr. CLEARY. Thank you, your Honor.

(Which were all of the proceedings had at the trial of the within cause on the day and date herein.)